



CRIMINAL LAW IN CAMEROON

SPECIFIC OFFENCES

Carlson Anyangwe

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Langua Research & Publishing CIG
Mankon, Bamenda

Publisher

Langaa RPCIG

Langaa Research & Publishing Common Initiative Group

P.O. Box 902 Mankon

Bamenda

North West Region

Cameroon

Langaagrp@gmail.com

www.langaa-rpcig.net

Distributed in and outside N. America by African Books Collective

orders@africanbookscollective.com

www.africanbookcollective.com

ISBN: 9956-726-62-1

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Preface

This textbook is on the substantive law of crime. Its focus is the criminal law, a branch of law which spells out the social reaction to crimes and criminals. Criminal law seeks to secure compliance with rules of behaviour, primarily through the threat of punishment when the rules are broken. It forbids and punishes conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests; differentiates on reasonable grounds between serious and minor offences; safeguards conduct that is without fault from condemnation as crimes; gives fair warning of the conduct declared to be an offence; and subjects to public control persons whose conduct indicates that they are disposed to commit crimes.

The criminal law of this country is largely codified in a Penal Code that saw the light of day in 1966/67. The Code is an amalgam of rules of criminal law derived primarily from English and French law. It consists of two broad divisions, each of which is called a 'Book'. Book I contains an enunciation of the general principles of criminal law, that is, the fundamental rules governing the whole of criminal law. The rules relate to the application in general of criminal law, to penalties and preventive measures in general, and to the general principles of criminal responsibility. Book II is denoted as 'particular crimes' and is the focus of this work. It contains the definitions of the offences covered in it and spells out the penalty for each offence. Offences in the Code are of three types, namely, felonies, the most serious offences; misdemeanours, less serious offences; and 'simple offences', minor or least serious offences. The substantive difference between them lies in the degree of severity of the penalties provided for the offences in each category. Basically, felonious offences are those punishable by death or by imprisonment for more than ten years; misdemeanours are those punishable by imprisonment for not less than ten days and not more than ten years and/or fine of more than 25 000 francs CFA; and simple offences are those punishable by imprisonment of not more than ten days and/or a fine of not more than 25 000 francs CFA.

Structurally, the Code broadly distinguished between 'simple offences', on the one hand, and felonies and misdemeanours, on the other hand. All 'simple offences' fall under one separate group regardless of the victim or of the interest injured by any such offences. Felonies and misdemeanours, by contrast, are clustered first on the basis of the direct victim of and secondly by the interest injured by each such offence. In some cases the identified direct victim is the state; in other cases it is the general public; and in still other cases it is the individual. The result of this scheme of things is that felonies and misdemeanours are grouped into three broad categories of offences: those against the state, those against the general interest, and those

against private interest. Within each of these three categories there is a further rearrangement of the offences into sub-categories based on the predominant interest that the law seeks to protect by criminalising each particular conduct. In the result, Book II of the Code has four parts, one dealing with crimes against the state, another with crimes against the general interest, yet another with crimes against private interest, and the final part with regulatory offences. The general organisation of this textbook follows this broad ordering of things.

Forty-five years since the Code came into force there is no textbook on the criminal law of this country. This is surprising given the centrality of criminal law in people's daily lives. About sixty years ago, the American re-known criminal law scholar, Herbert Weschsler, writing on 'The Challenge of a Model Penal Code' in the *Harvard Law Review* (volume 65, 1952, p. 1097), captured in the following words the importance of the criminal law in society:

"Whatever views one holds about the penal law, no one will questions its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual."

The need for a book on the criminal law of this country has thus been long overdue. The textbook is a pathfinder on the subject in this country and is based entirely on the particular crimes covered in Book II of the Code. There are over four hundred such crimes. For reasons of relevance and space I have not, in the scheme of this book, factored into it a general discussion of the criminal law as a critical aspect of human rights enforcement and protection. Such a discussion is undoubtedly interesting but would be tangential to the focus of the book. For reasons of space also I have not dealt with the general part of the criminal law. This means principles of criminal responsibility, absolute and partial defences of general application, parties to crime, and criminal disposal are not covered in this book. A single textbook fully covering the two Books of the Penal Code would be long, bulky, 'intimidating' and less user-friendly. The general part of the criminal law, based on Book I, is the subject of a separate companion textbook by this writer.

My discussion of the various offences is largely confined to the physical elements. Occasionally, however, the definition of a given offence is such that reference to a mental element is unavoidable. This is especially the situation where the definition of an offence includes an oblique or an ulterior mental element, such as an oblique intent, or again, where the definition includes some fault element. In all other situations, a discussion on the mental element of each offence is readily omitted because, as a general rule, admitting of some exceptions, the requisite mental element for most crimes in the Penal Code is intention. The general principle on this matter is declared in section 74 of the Penal Code in these terms:

“(1) No penalty may be imposed except upon a person criminally responsible.

(2) Criminal responsibility shall lie on him who intentionally commits each of the ingredient acts or omission of an offence with the intention of causing the result which completes it.

(3) Except as otherwise provided by law, no criminal responsibility shall arise from the result, though intended, of an omission.

(4) Except as otherwise provided by law, there shall be no criminal responsibility unless subsection (2) of this section has been satisfied: Provided that responsibility for a simple offence shall not require an intention to act or to omit or to cause the result.”

Section 74 thus defines the mental ingredient common to most offences – intention; so that not only must the act be intended, but the result or the consequence of the act must also be intended. One important consequence of this formulation is that the draftsman dispenses with the need to introduce in the section defining each individual offence such *mens rea* words as ‘intentionally’, ‘knowingly’, ‘wilfully’, ‘fraudulently’, ‘maliciously’, and so on. In the result, the specific offences in Book II define only the physical ingredients that distinguish one offence from another. There are a few exceptions, however. These exceptions relate to those instances where the lawmaker has seen fit to vary the mental elements by introducing either an oblique intent or some fault element (negligence, recklessness, rashness, carelessness) or where, as in the case of most simple offences, the mental element is dispensed with altogether. Generally then, the definition of responsibility must be read into each statement of offence in Book II.

Writing a pioneering book, however exciting the endeavour, is not always easy, and this one is no exception. Apart from some sporadic and ephemeral private initiatives, there is a complete absence of systematic law reporting in this country. The result is a paucity of reported local cases. The writer therefore had to go through the tedium of searching and selecting from court

files available cyclostyled judgments (court judgments in this country are not available online since courts are yet to catch up with the Internet age). These are cited here as ‘unreported’ cases. There is also an almost complete absence of published academic contribution in this area of the law in this country. Further, there are several offences in the Code in respect of which prosecutions are rare or non-existent. This could be because the offences are seldom committed. It could also be because the offences even if committed remain unknown to the police or the police are unwilling or unable to initiate criminal proceedings. Also, in the case of certain offences there is not even a single local case to be found that could possibly throw some light on the Code provisions, especially those that are vague.

In every such situation I have not limited myself to an analysis of the ingredients of each offence. I have gone further to offer a general, albeit brief, exposition of the law on the subject before proceeding to consider the elements of the offence. I have also called in aid and made profuse use of relevant, persuasive, and insightful decisions from other jurisdictions, more so in some sections of the Code than in others. I have, where no local cases are available, found guidance in relevant foreign decisions where they illuminate relevant provisions of the Code and where the principles enunciated in them are similar, relevant or compelling, or where the reasoning in them is helpful in elucidating the general tenor of the offences concerned. I consider this methodology important because it gives the subject depth and enhances understanding and lucidity. Given the paucity of decided cases in regard to many offences, appropriate foreign decisions are bound to be useful in expounding similar offences in the Code and to influence our courts in applying the provisions of the Code.

A conscious effort has been made in every chapter to be reasonably brief so as to produce overall a concise and manageable textbook suitable for easy use by the courts, legal practitioners and law students, and even members of the general public. A beginner’s threshold of boredom tends to be low. I have therefore made a conscious effort to enliven the debate and to keep the discussion and explanations within reasonable proportions.

The primary purpose of this book is educational. I make no assumption that the reader is already familiar with the offences dealt with. Nor do I make any assumption that the reader is familiar with Latin diction that seems to be an indispensable tool of trade for the profession of law. For those already participating directly in the process of the criminal law, whether as judges or prosecutors or as private legal practitioners this textbook will provide further insight and understanding of that part of the criminal law dealing with specific offences. For law students, the book will furnish a solid foundation for their study of substantive offences.

I wish to thank all those who have assisted me in various ways, including the publishers for compiling the table of index

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Mthatha/Pretoria, August 2011

Abbreviations

A.C.: Appeal Cases
All E. R.: All England Reports
All N. L. R.: All Nigeria Law Reports
BCA: Bamenda Court of Appeal
C. & K.: Carrington & Kirwan's Reports
Car. & M: Carrington & Marshman's Reports
CASWP: Court of Appeal South West Province
CCLR: Cameroon Common Law Reports
Ch. D (or Ch.): Law Reports, Chancery Division
C.L.R.: Commonwealth Law Reports (Australia)
Co. Rep.: Coke's Reports
Cox (Cox C.C.): Cox's Criminal Cases
Cr. App. R.: Criminal Appeal Reports
Crim L.R: Criminal Law Review
D.L.R.: Dominion Law Reports (Canada)
Dears & B: Dears & Barnewall's Reports
Den.: Denison's Crown Cases
EPOR: European Patents, Designs & Trademarks Office Reports
Ex. D. (or Ex.): Exchequer Division Reports
F. Supp.: Federal Reporter, Supplement (USA)
F.2nd: Federal Reporter, second series (USA)
FRS: Fleet Street Reports of Patent cases
L. & C.: Leigh & Cav's Crown cases
L.J. Ch: Law Journal Chancery
L.R.C.C.R.: Law Reports, Crown Cases Reserved
MacG. Cop. Cas.: MacG Copyright Cases
Md: Maryland (state of Maryland, USA)
NIJB: Northern Ireland Judicial Bulletin
N.L.R.: Nigerian Law Reports
N.R.N.L.R.: Northern Region, Nigerian Law Reports
Q.B. or Q.B.D.: Law Reports, Queen's (King's) Bench Division
RCD: Revue Camerounaise de Droit
RPC: Report of the Patents, Designs & Trademark Cases
SCR: Supreme Court Reports (Canada)
So. African L. Rep: South African Law reports

USPO: United States Patent & Trademark Office
U.Y.L.R.: University of Yaoundé Law Reports
W.A.C.A.: West African Court of Appeal Reports
W.C.L.R.: West Cameroon Law Reports
W.L.R.: Weekly Law reports
ZR: Zambia Law Reports

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Offences against the Security of the State

Distinction between external and internal security offences. The Penal Code distinguishes between crimes that affect the external, and those that affect the internal, security of the state. Crimes relating to the external security of the state are those that expose the state to danger, or weaken its defences in times of armed conflict. Crimes relating to the internal security of the state are those that either result in unconstitutional changes of government or in the impairment of the integrity of the state.

The distinction between external and internal security offences would seem unscientific and tenuous. It is therefore not surprising that the criminal law of many jurisdictions make no such distinction. Still, in the Penal Code the distinction serves as the basis for making yet another distinction, that between ‘political offences’ and ‘offences under the ordinary law’. Crimes against the internal security of the state were considered political offences, punishable by ‘detention’¹, while crimes against the external security of the state are, like the bulk of other crimes, offences under the ordinary law. The dichotomy between ‘political offences’ and ‘offences under the ordinary law’ became irrelevant when the political penalty of ‘detention’ was expunged from the Code. This made it less tenable to maintain the distinction between crimes against the external and crimes against the internal security of the state. But that has not diminished the Code’s obsessive interest in the law of treason and subversion.

Prosecution. No prosecution in respect of an offence under sections 102-110 and 114 may be instituted except by or with the consent of the Prosecutor General. But the fact that the prior consent of the Prosecutor General is required for the prosecution of any such offences, does not mean that every action in the criminal process in respect of any of the said offences need his fiat. An arrest may be made, a warrant of arrest may be issued or executed, a remand into custody may be ordered, and bail may be granted in respect of any of the offences under sections 102-110 and 114 notwithstanding that the consent of the Prosecutor General to the institution of a prosecution for any such offence has not been obtained².

Generally, in common law jurisdictions, no person may be convicted of treason unless on the testimony of two witnesses to the same overt act, or of one witness to one overt act and one other witness to another overt act of the same kind of treason, or unless on confession in open court. The law appears

¹ Sections 18 and 26.

² Section 46 (1) Schedule III (B) to the Penal Code.

to be the same in this country as provided under section 178 (2) (a) of the Evidence Ordinance.

In the American case of *Aaron Burr* a former US Vice President of that name was charged with treason within the meaning of Article III, Section 3 of the US Constitution³. Burr concocted a grandiose scheme to lead a revolt with British assistance in the frontier lands of the west where he hoped to establish a 'Western Empire' with himself as ruler. He had powerful allies for his scheme: the British Ambassador to the US, a Senator, a wealthy financier and an army General. The conspirators however hesitated in making their move and when they eventually did President Jefferson crushed the conspiracy by arranging for the Governor of Ohio to send in the local militia to a private island in Ohio which Burr decided to use as the base of operations for the revolt. Burr went into hiding but was arrested within a few months and put on trial. The principal charge against him was treason against the United States. The US Constitution provides that, "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

The case came before the famous American Judge, John Marshall. It was incumbent upon the prosecution not only to produce two witnesses, but those witnesses had to have seen some overt act by Burr in 'levying war' or leading the planned revolt against the United States. But Burr had actually not been present in Ohio when the militia stormed the identified location on the island. The prosecution however argued that Burr's involvement in the conspiracy made him 'constructively present' on the island and thus involved in an overt act. The defence focused attention on the prosecution's strained interpretation on what constituted an 'overt act'. It was the submission of the defence that "acts on the island were not acts of war ... [and that] there was no bloody battle ... no bloody war."

After listening to the legal arguments presented by both sides, Marshall J. made a lengthy ruling. He held that if the prosecution had proved with two witnesses that Burr had 'procured' or caused the men and material to assemble on the island to launch a revolt, then the necessary overt act could be established. The prosecution had not done this, however. All they had presented at the trial, said the learned Judge, was testimony that would 'confirm' or 'corroborate' such eyewitnesses, but not any eyewitnesses themselves. Therefore, he concluded, the prosecution's evidence was inadmissible and the jury had to ignore it. The jury accordingly returned a verdict of "not guilty under this indictment by any evidence submitted to us."

Accessory penalties. Sections 118-121 empower the trial court to impose,

³ EW Knappman (ed.), *Great American Trials*, Visible Ink Press, Detroit, 1994, p. 78.

additionally to a principal penalty, two types of accessory penalties on a person guilty of any of the offences under sections 102-116. The two types of accessory penalties that may be imposed are *forfeitures*⁴ and *confiscation*⁵.

Under section 118 the court *must* order the confiscation of any property, movable or immovable, *belonging to the offender* and attached which was *used as an instrument of the commission of the offence*, or *is the proceeds of the offence*. Even if such property which served as an instrument in the commission of the offence or which represents the proceeds of the offence does not belong to the offender it may nevertheless still be confiscated.

Again, under section 119 the court *may* order the confiscation of what is apparently the offender's property, of whatever nature and whether or not held jointly, but to which he can show no lawful title. In time of war the confiscation of such property the title to which the offender cannot show is mandatory not discretionary. At any rate, whether in time of peace or war, the court *may* in addition order the confiscation of all or part of the offender's lawfully acquired property.

A life sentence or a death penalty commuted into life automatically carries with it for life all the forfeitures or disqualifications set out in section 30 of the Penal Code. Any other sentence for felony involves, as a general rule, all the forfeitures listed in section 30 for the duration of the sentence passed and ten years after release from prison⁶. But the court has power to reduce this sentence. When it exercises that power it is required to state in its decision the reasons for reducing the sentence⁷.

On conviction for any of the offences under sections 102-116, the trial court may not reduce below five years the duration of the forfeitures⁸. However, the duration of post-penal measures listed in section 40⁹ may be extended to 10 years¹⁰.

Where the offender is an officer or official of the public service or a member of the armed forces, disqualification from public service may be for life. The imposition of a more severe accessory penalty in this case may be explained by the fact that it is pre-eminently the public servant or soldier who often has the opportunity and is more likely to commit treason and treasonable crimes.

International relations. The offences under this chapter focus on the

⁴ Sections 30 and 121.

⁵ Sections 35 and 118-120.

⁶ Section 31 (1)(2).

⁷ Section 31 (3).

⁸ Section 121 (1)(2).

⁹ By s. 40 (1), every offender sentenced to imprisonment for more than a year may on conviction be subjected by the court to post-penal supervision and assistance.

¹⁰ Section 121 (3).

‘defence of the nation’. None of the offences captures the case of a public servant, including a former public servant, who without lawful authority makes a damaging disclosure of any information relating to international relations; or any confidential information, which was obtained from a foreign state or an international organization.

§1. Treasonable acts

Sections 102 to 110 deal with what are in fact several heads of treason. Some of these treason offences are punishable by death. Others carry a custodial sentence the length of which varies depending on whether the crime is committed in peacetime or wartime. Treason is a crime against breach of allegiance and a person who commits treason is a ‘traitor’.

No crime, it has been said, is greater than treason because treason threatens the very existence of the state. In other jurisdictions the gist of treason is the levying of war against the state or in assisting the enemies of the state. Under the Penal Code, however, the offence of treason is very widely drawn. The offence embraces conduct often punishable as espionage or spying for the enemy, and conduct punishable under official secrets legislation.

History. The crime of treason goes back to ancient times. The Roman *crimen laesae majestatis* punished various forms of impairment of the supreme power of the Roman Emperor¹¹. The English common law distinguished between high treason and petty treason¹². High treason was the supreme offence of breach of allegiance to the Crown¹³. Allegiance was originally a personal matter, the bond between subject and Sovereign; and so English law defined treason in personal terms¹⁴. Petty treason on the other hand was committed when a person of inferior status unlawfully killed a person of superior status. Thus where a servant killed his or her master, or a wife killed her husband, or an ecclesiastical person killed his superior this was petty treason on the ground that it was an atrocious breach of domestic or moral allegiance.

Concretely, high treason was breach of allegiance to the Crown while petty treason was breach of domestic or moral allegiance to a superior. However, whereas petty treason was confined to cases of killing (of a person of superior status by a person of inferior status) high treason was not confined to cases of regicide but extended beyond that. It included ‘violating’ (i.e. having sex with)

¹¹ CR Snyman, *Criminal Law*, Butterworths, Durban, 1995, p. 296.

¹² JWC Turner, *Russell on Crime Volume I*, Stevens & Sons, London, 1964, p. 207.

¹³ PS James, *Introduction to English Law*, 1962, p. 189.

¹⁴ There were seven heads of high treason: imagining the death of the king etc; violating the king’s consort etc; levying war against the king in his realm; adhering to the king’s enemies etc; counterfeiting the king’s seals or money; importing counterfeit money; slaying the chancellor or the judges.

the King's consort, his eldest daughter unmarried and the wife of the King's eldest son and heir.

The contrast between high treason and petty treason did not therefore appear apposite. Moreover, it soon became unseemly to take a person's status as a factor aggravating murder. In the early 19th century therefore the distinction between petty treason and ordinary murder was abolished, and petty treason became punishable simply as ordinary murder. With the disappearance of petty treason only high treason remains, or more accurately, 'treason' *tout court*.

The Penal Code thus speaks of 'treason'¹⁵, not 'high treason', the term 'high' having become redundant with the abolition of 'petty treason'. However, the President and his ministers may be impeached for 'high treason' for any conspiracy against the security of the state.

Allegiance. The fundamental characteristic of treason is that it is the breach or betrayal of that faith and allegiance which are due to the state from its citizens as well as from aliens ordinarily resident therein and therefore enjoying its protection.

The duty of allegiance to the state may be 'natural' or 'local'. Any breach thereof would amount to treason. 'Natural' allegiance is the allegiance owed by a citizen to his country. It follows the citizen wherever he may be. It may thus be violated even when the citizen is abroad.

'Local' allegiance, on the other hand, is allegiance owed to the state of residence. It is an established rule, recognized both in international and municipal law, that when an alien comes voluntarily within the jurisdiction of the state with the express or implied permission of the state, he is deemed to be placing himself within, and entitled to claim, the state's protection. For that reason, he owes the corresponding duty of allegiance to the state so long as he remains within its protection.

An alien who is resident within and therefore under the protection of the state owes a duty of allegiance to the state and may be convicted of treason if he assists the enemy. An alien, who has resided within the protecting state and does any treasonable act after leaving the state, may be tried for and convicted of treason in this country if he continues to enjoy this country's protection, for example, by holding a passport issued by this country.

This point may usefully be illustrated by the English case of *Joyce v. Director of Public Prosecutions*¹⁶. Joyce, an American citizen, obtained a British passport in 1933 by falsely describing himself as a British subject. He renewed the passport in 1939 and soon afterwards went to Germany. He was employed by the German Radio Company of Berlin, to broadcast propaganda on behalf of the

¹⁵ Sections 102 and 103.

¹⁶ [1946] 1 All ER 186, HL

enemy during the Second World War. He was convicted of high treason and he unsuccessfully appealed to the Court of Criminal Appeal on the grounds that on leaving Britain he had ceased to owe allegiance to His Majesty, that the Courts had no jurisdiction to try him for treason committed abroad, and that the matter of the use he had made of his passport had not been left to the jury. His further appeal to the House of Lords fared no better. Lord Jowitt L.C. said:

“I have said, my Lords, that the question for consideration is bound up with the question of allegiance. Allegiance is owed to their sovereign Lord the King by his natural born subjects; ... so it is by those who, being aliens, reside within the King’s realm ... By what means and when can they cast off allegiance? The natural-born subject cannot at common law at any time cast it off. *Nemo potest exuere patriam*’ is a fundamental maxim of the law for which relief was given only by recent statutes. Nor can the naturalised subjects at common law. It is in regard to the alien resident within the realm that the controversy in this case arises. Admittedly, he owes allegiance while he is so resident, but it is argued that his allegiance extends no further. ... [I]t has been argued with great force that the physical presence of the alien actor within the realm is necessary to make his act treasonable. It is implicit in this argument that during absence from the realm, however brief, an alien ordinarily resident within the realm cannot commit treason. ... My Lords, in my opinion ... this ... is not only at variance with the principle of the law, but is inconsistent with authority which your Lordships cannot disregard. ... It would, I think, be strangely inconsistent with the robust and vigorous commonsense of the common law to suppose that an alien quitting his residence in the country and temporarily on the high seas beyond territorial waters or at some distant spot now brought within speedy reach and there adhering and giving aid to the King’s enemies could do so with impunity. ... It is not ... an answer to the sovereign’s claim to fidelity from an alien without the realm who holds a British passport that there cannot be extended to him the protection of the law. What is this protection upon which the claim to fidelity is founded? To me, my Lords, it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of the passport is acquiring substantial privileges. ... I should make it clear that it is no part of the case for the Crown that the appellant is debarred from alleging that he is not a British subject. The contention is a different one: it is that by the holding of a passport he asserts and maintains the relation in which he formerly stood, claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity. In these circumstances I am clearly of opinion that so long as he holds the passport he is within the meaning of the statute a man who, if he is adherent to the King’s enemies in the realm or elsewhere, commits an act of treason. ... The statute in question deals with the crime of treason committed within, or as was held in *R v. Casement*, without the realm; it is general in its terms and I see no reason for limiting its scope except in the way that I indicated earlier in this opinion, viz.: that, since it is declaratory of the crime of treason, it can apply only to those who are capable of committing that crime. No principle of comity demands that a state

should ignore the crime of treason committed against it outside its territory. On the contrary, a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm should be amenable to its laws.”

In the view of some commentators, however, the decision in *Joyce* is “open to criticism, not least because Joyce (like any British passport holder) had no legal entitlement to the protection of the Crown while abroad and, indeed had no intention of availing himself of such protection”¹⁷.

State security offences punishable wherever committed. Section 8(b) of the Penal Code enacts that “the criminal law of the Republic shall apply ... (b) to any offence against the security of the state ... *wherever committed* ...” Offences against the security of the state include treasonable acts.

The inference to be drawn from this section is that even a foreigner who owes no allegiance to this country or who has never set foot here may be convicted of treason. However, in terms of the proviso to section 8(b) a foreigner acting only abroad cannot be tried here “unless he has been arrested within the territory of the Republic or has been extradited to it.” He cannot be tried in his absence unless, of course, if having been arrested here he escapes from custody.

One should be careful not to conclude from the general tenor of section 8(b) that the law of treason under the Penal Code is not based on the breach of the duty of allegiance to the state. It is, at least as far as citizens and permanent residents are concerned.

Treason committed by a foreigner is known as *espionage*, an indication that the foreigner’s offence is not based on breach of the duty of allegiance to the offended state. Indeed, the foreigner, though owing no duty to this country, is nevertheless punishable for the sufficient reason that the consequences of his act are very serious for the country. In international law the basis of the assumption and exercise of jurisdiction by the offended state is the protective principle. That principle entitles the offended state to assert authority and exercise jurisdiction over crimes against its security and integrity or its vital economic interest, committed even abroad and by an alien¹⁸.

In the South African case of *Rex v. Neumann*¹⁹ the accused was indicted for high treason. He was charged with having enlisted and served in the military forces of Germany and with questioning members of the military forces of

¹⁷ R Card, *Criminal Law*, Butterworths, London, 1995, p. 386.

¹⁸ *Joyce v. DPP*; *US v. Chandler*, 72 F. Supp. 230 (1947); *US v. Rodriguez*, 182 F. Supp. 479 (S.D. Col. 1960); *Rocha v. US*, 288 F. 2nd 545 (9th Cir. 1961); *Stegeman v. US*, 425 F. 2nd 984 (1970).

¹⁹ [1949] 3 So.African L.Rep. 1238. Excerpts of the case are reprinted in JM Sweeney et al., *The International Legal System – Cases and Materials*, Foundation Press, New York, 1981, pp. 524-527.

South Africa while that state was at war with Germany. It was admitted by the Crown that the defendant was a German by birth and not naturalized in South Africa. The court recognized this fact. It said:

“The present is, of course, a case of a conflict between two allegiances: on the one hand there is the accused’s allegiance to the state of which he is a born subject. Of this allegiance he has never formally divested himself by the acquisition of citizen by naturalization. On the other hand there is the qualified, the less extensive, allegiance which was created by his having come to settle in the Union [of South Africa] and having become a Union soldier.”

In spite of this acknowledged conflict in allegiance the court declined to dismiss the indictment. “It seems to be beyond question, from the authorities quoted to us, that not only in the law of England but also in the Roman-Dutch law an alien resident in a sovereign state foreign to him owes a qualified allegiance to that state, even when that state and his own are at war with one another.” So, after the Crown’s evidence was heard, the court rejected the defendant’s application for discharge, in effect holding that he had a case to answer.

Even so, the scope of treasonable acts for which a foreigner may be held liable is narrow. There are specific kinds of treason that are capable of being committed only by a ‘citizen’²⁰ or a ‘citizen or resident’²¹. Other kinds are capable of being committed by ‘who ever’; though even here the context would make it clear whether the contemplated offender could be a citizen as well as a foreigner²², a citizen only²³ or just anyone.

A. Treasonable offences punishable by death

There are seven heads of treason whether committed in wartime or in peacetime that carry the death penalty. Two of these offences are in s. 102 (‘hostilities against the fatherland’) and five in s. 103 (‘other felonies punishable with death’). The seven treasonable offences punishable capitally are the following.

i. Assisting or offering to assist in hostilities against the Republic

‘Assisting’ and ‘offering to assist’ are consummated offence in themselves and not merely abetment. In *Lynch*²⁴ it was held that there was an adherence to the enemy within the meaning of the law on treason when a British subject became a naturalized subject of an enemy state in time of war. A court in this

²⁰ Sections 102 and 107.

²¹ Section 108.

²² Section 103.

²³ Sections 105 (9), 106 (9).

²⁴ [1903] 1 KB 444.

country would most likely, on those same facts, arrive at the same decision on the reasoning that the naturalization amounts to ‘assisting’ or ‘offering to assist’ the enemy in hostilities against the Republic. In *Casement*²⁵ a British subject was held guilty of treason when he incited British prisoners of war to join the enemy forces and to participate in an expedition in a submarine, which had as its object the landing of arms in Ireland. Again, a court in this country would most likely, on these same facts, also arrive at the same decision, as did the English court.

*ii. Taking part in hostilities against the Republic*²⁶.

iii. Instigating a foreign power to undertake hostilities against the Republic.

iv. Surrendering or offering to surrender to a foreign power or to its agents any troops, territory, installation or equipment employed in the defence of the nation, or any defence secret.

v. Acquiring, in whatever manner, a defence secret with intent to surrender it to a foreign power.

vi. Damaging any construction, installation or equipment with intent to injure the defence of the nation.

In the American case of *John Brown* (1859)²⁷ the defendant was tried by a Virginia court for leading a famous but unsuccessful raid on the federal arsenal in Harpers Ferry, Virginia, with the object of arming Southern slaves. On October 16, 1859, Brown and 21 raiders succeeded in seizing the Harpers Ferry arsenal by surprise. Instead of attracting black followers, however, the raid only succeeded in bringing out the armed and local white residents, who surrounded the arsenal until federal troops arrived. After a brief siege, the arsenal was stormed. Brown, together with his few surviving followers, was captured. Even though he had not yet recovered from injuries sustained when the troops stormed the arsenal, Brown was brought to attend the proceedings lying in a cot, nursing his wounds. The charges were murder and insurrection.

When the trial began defence counsel submitted that Brown was insane and requested the trial Judge to so declare the defendant. The defence tendered in evidence a telegram from a source that knew Brown and his family. The telegram declared, “Insanity is hereditary in that family. ... These facts can be conclusively proven by witnesses residing here, who would doubtless attend the trial if desired.” But Brown would have nothing to do

²⁵ [1917] 1 KB 98.

²⁶ Cf. *Rex v. Neumann* (1949).

²⁷ *Great American Trials*, p. 133.

with the insanity defence. Protesting from his small folding bed, he said angrily, "I look upon this as a miserable pretext of those who ought to take a different course in regard to me, if they took any at all. ... I am perfectly unconscious of insanity, and I reject, so far as I am capable, any attempt to interfere on my behalf on that score." This outburst effectively destroyed the chances for any insanity defence.

The prosecution produced a number of witnesses who gave evidence against Brown. The murder charge was supported by the testimony of witnesses who described the killings by Brown and his men during the raid. Regarding the charge of insurrection witnesses testified that they had overheard Brown talk of arming runaway slaves to fight their masters.

Defence counsel put together an aggressive closing statement. He attacked the charge of insurrection, submitting that since Brown was not from the State of Virginia he did not owe that state any duty of loyalty. But this valiant effort fared no better than the insanity argument. After less than an hour of deliberation, the jury returned a guilty verdict. When Brown stood up to receive his sentence, he used the occasion to make a stirring statement that later galvanized anti-slavery public opinion in America:

"This court acknowledges, as I suppose, the validity of the law of God. I see a book kissed here which I suppose to be the Bible, or at least the New Testament. That teaches me that all things whatsoever I would that men should do to me, I should do even so to them. It teaches me, further, to 'remember them that are in bonds, as bound with them.' I endeavored to act up to that instruction. I say, I am yet too young to understand that God is any respecter of persons. I believe that to have interfered as I have done – in behalf of His despised poor, was not wrong, but right. Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicket, cruel, and unjust enactments, I submit, so let it be done!"

The judge was unmoved by Brown's poignant oratory. He sentenced him to hang. Before he went to the gallows, Brown delivered this final prophetic message to America about the inevitability of civil war in that country: "I John Brown am now quite certain that the crimes of this guilty land will never be purged away but with Blood. I had, as I now think, vainly flattered myself that without very much bloodshed it might be done."

It was not long before Brown soon became a martyr and the following song became the battle cry against slavery in America:

"John Brown's body lies a-moldering in the grave,
John Brown's body lies a-moldering in the grave,
John Brown's body lies a-moldering in the grave,

And his soul goes marching on!
Glory, glory alleluia,
Glory, glory alleluia,
Glory, glory alleluia,
And his soul goes marching on!”

vii. Committing any malpractice liable to prevent the normal working of any construction, installation or equipment or to lead to an accident, with intent to injure the defence of the nation.

Only a citizen may be convicted of any of these two treasonable offences. An alien, even if he resides in this country, may not. A foreign soldier, for example, who takes part in hostilities or assists or offers to assist in hostilities against this country, can be prosecuted, but the indictment will characterize the offence as ‘espionage’ rather than as ‘treason’. It follows that a citizen who commits any of the above acts is guilty of ‘treason’, while the alien who commits any of the self-same acts is guilty of ‘espionage’.

In the American case of *Major John Andre* (1780)²⁸ the defendant, head of the British intelligence in America, was tried, convicted and sentenced to death for the crime of espionage, in that an American soldier, General Benedict Arnold, had treasonably plotted with him to surrender over the American stronghold at West Point to the British. America and Britain were then at war. Both men, together with some accomplices, set about executing their plan. But they bungled it. The plot was foiled and Major John Andre was arrested and was charged with espionage before a military board composed of 14 generals. The board dismissed Major Andre’s argument that his capture amounted to being made a prisoner of war and that therefore he ought to benefit from such treatment as that status confers.

The unanimous decision of the board was that, “Major Andre, Adjutant General of the British Army, ought to be considered a spy from the enemy, and that agreeable to the law and usages of nations, it is their opinion he ought to suffer death.” The American President, George Washington, confirmed the death sentence by hanging. Andre then appealed to him for a soldier’s death by firing squad over what was considered the less honourable mode of execution ‘on the gibbet’ (i.e., by hanging). The appeal was rejected. At that time spies were always hanged. To deviate from this practice would have cast a doubt on Andre’s guilt. If Andre was not a spy, then he was a prisoner of war and should not be executed at all. But the board had ruled that he was “a spy from the enemy”. Washington therefore had no choice but to reject Andre’s appeal for execution by firing squad. Andre, in uniform, was publicly hanged.

²⁸ *Great American Trials*, op. cit., p. 53.

‘Hostilities’. The term ‘hostilities’ means warlike operations in the ordinary meaning of that word, that is, any armed conflict with or without the intention to make war, and whether of an international or non-international character. It is a synonym for war. The latter term is, speaking pedantically, the legal characterization of the state of affairs existing between states when force is used to vindicate rights or settle disputes between them. A war can be an inter-state armed conflict (war of an international character) or an intra-state armed conflict (a civil war or an armed conflict of a non-international character).

A punitive intervention, whether permissible or impermissible, a blockage, whether pacific or wartime, and an armed reprisal are all hostilities. Hostilities may thus be undertaken in very different ways and by different means in different periods of human progress. However, hostile propaganda, so-called diplomatic offensive or confrontation, economic reprisals, economic aggression, acts of retorsion, and hostile international opinion, do not fall within the ordinary meaning of the term ‘hostilities’ even though such acts are evidently hostile.

The hostilities must be against the Republic, and this includes any part of it. If the hostilities are against disputed territory it is doubtful that treason would have been committed.

‘Taking part’, ‘assisting’ or ‘offering to assist’. ‘Taking part’ means actively involved whether from the onset or at a later stage. The degree and nature of involvement, and the capacity in which the accused was involved in the hostilities are immaterial for culpability though not for sentence. If the accused took part in hostilities he cannot be heard to say his role did not involve the use of any arms. If he did not actively take part in the hostilities but merely assisted or offered to assist in them, he is guilty of treason all the same. ‘Assisting’ or ‘offering to assist’ is participation all the same albeit that it is passive or secondary participation.

Instigation. To instigate means to initiate, induce or cause to happen. But it need not be shown that the hostilities were actually undertaken following the instigation to do so. The instigator is guilty of treasonable felony whether or not the foreign power undertakes hostilities against the Republic. Instigation remains instigation whether the person or power instigated gives ear or not.

A peculiarity of this crime is that what is in fact accessoryship is punished as a substantive offence. If the instigation fails to achieve its intended purpose (e.g., the power instigated fails or refuses to act, or a letter containing the instigating communication is intercepted) the instigator will be guilty of attempted abetment²⁹.

The intended recipient of the instigation must be a ‘foreign power’, that is,

²⁹ Section 97 (2).

a foreign state of any stature whatever. The crime is not consummated if the addressee of the instigation is a non-state entity such as an organization or movement, a government-in-exile, an insurgent or a rebel movement, a territory aspiring to statehood, or a sub-national component of a state.

Defence secret. The offence under head 4 is consummated whether or not the foreign state is a hostile power, whether or not the act was done in peacetime or in wartime, whether or not the agent of the foreign power is an alien or a national, and whether or not the surrender was gratuitous or for a reward, present or future. However, the installations or equipment surrendered by the accused must be those employed for the defence of the nation and it must be shown further that the accused knew they were so employed.

Likewise, where it is alleged that the accused surrendered a defence secret it must be proved that he knew that it was a defence secret. It is a defence to prove that the matter acquired or surrendered is not a defence secret. It is also a defence to show that the defendant did not know and could not reasonably have been expected to believe that the matter was a defence secret. A defence secret is “any information of whatever kind liable to assist hostile undertakings against the Republic and not already made public”³⁰.

The mere acquisition, in whatever manner, of a defence secret with the intention of surrendering it to a foreign power is a treasonable act even though no actual surrendering takes place.

It is noteworthy that in some of these offences the law requires proof not only of the general intent³¹ but of a specific intent as well³².

In all of the offences under ss.102 and 103 the specific treasonable act should be charged as such, rather than charging say ‘treason’ or ‘espionage’ or ‘hostility against the fatherland’ or ‘felony punishable with death’. Any of the latter charges would be bad for vagueness or duplicity as there are several treasonable, espionage etc offences.

Punishment. The punishment for each of the seven heads of treason is death by hanging or shooting³³. But a guilty verdict does not *ipso facto* entail the passing of the death sentence. That sentence is not mandatory in the sense that the court is obliged to impose it whenever guilt is proved. The court may, in a fit case, and notwithstanding the finding of guilt, reduce the penalty to a term of imprisonment³⁴. In terms of section 31 (1) a life sentence, or a death

³⁰ Section 109.

³¹ Section 74 (2).

³² Where proof of an ulterior intent is required this is denoted by the words ‘with intent to’.

³³ Section 23 (1); and cf. s.22.

³⁴ Section 104.

sentence commuted into life, automatically involves all the forfeitures³⁵ prescribed in section 30. Finally, any of the acts in sections 102 and 103 is punishable whether committed in peacetime or wartime.

B. Wartime treasonable offences

1. Those punishable by imprisonment for from 10 to 20 years

Section 108 (1) punishes with imprisonment for from ten to twenty years any citizen or resident who in time of war and without permission from the proper authority (a) carries on any correspondence or relations with the subjects or agents of the enemy; or (b) concludes, directly or indirectly, any business transaction with a subject or agent of the enemy, or with any person residing in his territory.

When war breaks out between states, the laws of war replace the laws of peace. This is so unless the belligerents desire to continue to apply some of the rules of the law of peace. One effect of the outbreak of war on the relations between belligerents is that trading and intercourse between the subjects of belligerent states cease. This is often the case because nationals of an enemy state resident in enemy territory and neutrals residing and carrying on business in enemy territory, including companies incorporated in or controlled by an enemy state all have ‘enemy character’. International law gives belligerent states the widest freedom in the enactment of municipal laws dealing with the subject.

Section 108(1) is one facet of domestic enactment on that subject. The provision, be it noted, does not proscribe outright trading and intercourse with enemy nationals or agents³⁶. It prohibits such dealings only when carried out “without permission from the proper authority.” The permission must however issue from the ‘proper authority’, that is, the authority legally competent to give it.

The offences in section 108(1) are capable of being committed only in time of war (that is, during belligerent operations or engagement of opposing forces, whether on land, air or sea, whether of high or low intensity, and whether or not war has been solemnly declared) and then only by a citizen or a resident acting intentionally.

The word ‘any’ in section 108(1)(a) indicates that the crime is punishable

³⁵ The forfeitures listed in section 30 are: removal and exclusion from any public service, employment or office; incapacity to be a juror, assessor, expert referee or sworn expert; incapacity to be a guardian, curator, deputy guardian or committee, save of the offender’s own children, or member of a family council; prohibition on wearing any decoration; prohibition on serving in the armed forces; prohibition on keeping a school, on teaching in any educational establishment, and in general in holding any post connected with the education or care of children.”

³⁶ An enemy agent may even be a national who has put himself at the service of the enemy.

irrespective of the nature of the correspondence or the relations carried out (political, commercial, friendly). Where the correspondence or relation is carried out with the intention of assisting the enemy an offence contrary to section 102 (b) would have been committed.

expert referee or sworn expert; incapacity to be guardian, curator, deputy guardian or committee, save of the offender's own children, or member of a family council; prohibition on wearing any decoration; prohibition on serving in the armed forces; prohibition on keeping a school, on teaching in any educational establishment, and in general on holding any post connected with the education or care of children.

In some cases the national status of the offender, whether a citizen, a resident or an alien, is immaterial. By section 108(2), "whoever in time of war (a) joins in any undertaking to spread alarm and despondency in the defence forces or in the nation, with intent thereby to injure the defence of the nation; or (b) commits any offence described by sections 105, 106 or 107, shall be punished with imprisonment for from ten to twenty years."

In order to secure a conviction under this section the prosecution must show that the alarm and despondency were spread intentionally, that they were spread with the specific intent to injure the defence of the nation, that the accused joined in an 'undertaking' (that is, an enterprise, a common agreement, or an organization) to spread the alarm and despondency, and that the alarm and despondency were spread in the defence forces or at least in the nation. The phrase 'time of war' in this subsection includes "any state of emergency, mobilization or siege"³⁷ and so has a broader meaning than it does in the preceding subsection.

The offence of 'spreading alarm and despondency' has implications for freedom of speech. Take, for example, *Schenck v. US* (1919)³⁸. Just before the US entered the First World War in 1917, Congress passed the Espionage Act, which made it a federal crime to obstruct the country's war effort. The Socialist Party in Philadelphia printed 15 000 leaflets, which were distributed to men who had been drafted into the US military. The leaflets recited the first section of the Thirteenth Amendment to the US Constitution, which states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

The leaflets advised the reader that a conscript was little better than a convict, and described conscription as despotism in its worst form and as a monstrous wrong against humanity. "Do not submit to intimidation," the leaflets said, urging readers to petition for repeal of the Conscription Act. Charles Schenck was the general secretary of the Socialist Party and was in

³⁷ Section 108 (4).

³⁸ *Great American Trials*, op. cit., p. 284.

charge of the Philadelphia headquarters from which the leaflets were sent. He was arrested and indicted for sedition in conspiring to cause insubordination in the armed forces and obstruction of recruitment and enlistment.

The defence argued that Schenck had done no more than exercise the right guaranteed him by the First Amendment – the right to speak freely on a public issue. Schenck was nevertheless convicted. His appeal went right to the US Supreme Court where he steadfastly insisted on his right to freedom of speech, adding that there was not enough evidence to prove that he himself was concerned with sending out the pamphlets.

Mr. Justice Oliver Wendell Holmes, that great American Judge, wrote the opinion of the Court with which the other Justices of the Supreme Court concurred. The learned Judge disposed of the latter limb of Schenck's submission by reviewing the evidence, which clearly established that Schenck was largely instrumental in sending the leaflets out. On the first limb of the submission on free speech, Holmes made some of his most memorable and oft-quoted statements of the law (*Great American Trials*, p. 286):

“Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. ... We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. ... [The] clear and present danger [is a question of] proximity and degree ... When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.”

In the opinion of the learned Judge, it made no difference that Schenck and his comrades had failed to obstruct recruitment. The statute, he said, punishes conspiracies to obstruct as well as actual obstruction. Therefore, there could be no warrant for saying that only when the act succeeds does it then become a crime. Schenck's conviction and sentence to 10 years' imprisonment by the lower courts was affirmed.

2. Those punishable by imprisonment of up to 5 years

“Whoever in time of war commits any act of any kind liable to injure the defence of the nation shall, if no higher penalty be provided, be punished with

imprisonment for from one to five years or with fine of from fifty thousand to five million francs, or with both such imprisonment and fine”³⁹.

This residuary catchall offence is nebulous, too widely drawn and probably offends against the principle of legality. It punishes ‘any act’. That term is sufficiently wide to include sabotage, giving information to the enemy relating to security or intelligence, broadcasting propaganda on behalf of the enemy, providing invading enemy forces with food, shelter or military equipment, or voluntarily accepting a position under the command of the enemy, for example, a position as guard, driver, interpreter or even as a cook. The impugned act must, however, be one *liable* to injure the ‘defence of the nation’. The phrase ‘defence of the nation’ is frequently used in this part of the code but is not defined; nevertheless, it undoubtedly includes the country’s war effort. ‘Time of war’ embraces any state of emergency, mobilization or siege.

A 61-year-old American citizen and poet, Ezra Pound, who, during World War II, made regular radio broadcasts from Rome aimed at America and against the US, was indicted for treason. This was in the case of *Ezra Pound* (1946) in which the issue of insanity was raised but never fully resolved. When Pound learnt of his indictment he wrote to the US Attorney General, expressing his complete surprise. “I do not believe that the simple fact of speaking over the radio,” he wrote, “can in itself constitute treason. I think that must depend on what is said. ... I have not spoken with regard to this war, but in protest against a system which creates one war after another. ... I have not spoken to the troops, and have not suggested that the troops should mutiny or revolt.” The Librarian of Congress, Archibald MacLeish, asked if the indictment might not “confer the paraphernalia of martyrdom upon a half-cracked and extremely foolish individual.”

At the end of the war he was sent to America to stand trial. The defence was that of insanity. Defence counsel’s strategy consisted in proving clinical insanity as the only way to save Pound from execution for treason. The clinical report of four psychiatrists unanimously declared that Pound was not sane enough to stand trial. In the opinion of one of them, Pound suffered from delusions that he had valuable connections ‘in a half dozen countries’ and should be ‘an adviser to the state department’.

The prosecution insisted on an insanity hearing in open court. At that hearing the jury heard that Pound “shows a remarkable grandiosity..., believes he has been designated to save the Constitution of the United States for the people of the United States..., has a feeling that he has the key to the peace of the world through the writings of Confucious..., [and] believes that with himself as a leader a group of intellectuals could work for world order ...” After hearing this it took the jury just three minutes to announce that Pound

³⁹ Section 108(3).

was truly of ‘unsound mind’.

He was confined in a hospital for the insane, to remain there until he was fit for trial. While there he was awarded a prestigious prize for poetry. A Presidential pardon was proposed in 1954, but was dismissed under the dubious rationale that one cannot be pardoned until after one has been found guilty. Efforts to get the Attorney General to enter a *nolle prosequi* (to ‘*nol pros*’ as it is said in America), or to quash, the standing indictment for treason resulted in the indictment being dismissed in 1958, the Judge basing his decision on the affidavit evidence of the psychiatrist at the hospital for the insane that Pound was still unfit for trial. Pound was released. He sailed for Italy where he died in 1972.

Another American treason trial following World War II was that of Iva Ikuko Toguri, a 33-year-old Japanese-American woman. The case became known as the *Tokyo Rose Trial* (1949)⁴⁰. In 1941 Toguri went to Japan for the first time to visit relatives. In 1943 she was forced to become one of the several female radio announcers for Radio Tokyo, all the female announcers being collectively termed ‘Tokyo Rose’ by American soldiers. She was initially arrested in 1945, released, but rearrested in 1948 and brought back to America to stand trial.

Eight treason charges were laid against her. She pleaded not guilty. The trial lasted three months and the jury was deadlocked. Eventually, after much cajoling, the jury returned a guilty verdict. Toguri was sentenced to 10 years’ imprisonment and to a fine of \$10 000. She was released after serving six years and, following a heated debate over the fairness of her trial, was granted a Presidential pardon, officially exonerated and given back her US citizenship.

C. Peacetime treasonable offences

1. Those punishable by imprisonment of up to 10 years

Section 105 contains ten distinct peacetime punishable offences. These offences are discussed below.

i. Where a person acquires a defence secret otherwise than in order to surrender it to a foreign power.

This offence is consummated by the mere acquisition of the defence secret for some purpose otherwise than in order to surrender it to a foreign power. If the purpose of acquiring the defence secret was to surrender it to a foreign power an offence under section 105(2) would have been committed, for to ‘collect’ also means to ‘acquire’. Where the secret was acquired and in fact surrendered to a foreign power the indictment would have to be laid under section 103(b). The method by which the defence secret is acquired is immaterial. It may be by

⁴⁰ *Great American Trials*, p.450.

memorizing, collecting, recording, photographing, videotaping, stealing, false pretences, bribery, or any other means whatever.

ii. Where a person reveals a defence secret to a person not entitled to know it.

Where a person not entitled to access to a defence secret nevertheless acquires the same and reveals it to a person not entitled to know it, he would be caught by the provision. But he commits no offence under the section if the secret is revealed to a person entitled to know it. If the secret were revealed to an agent of a foreign power, technically the secret would have been ‘surrendered’ to that power and a prosecution under section 103(b) would be in order. Where a person who lawfully has access to a defence secret reveals it to a person not entitled to know it, he will be caught under s. 105; and if the secret was revealed to a foreign power or its agent the charge would be preferred under section 103(b).

Intelligence officers lawfully have access to defence secrets and have a lifelong duty not to reveal such secrets to a person not entitled to know it, and *a fortiori*, to the public at large. But consider the case of *Attorney-General v. Guardian Newspapers Ltd*⁴¹ and that of *Attorney-General v. The Observer Ltd*. In both cases the UK Government failed to use the breach of confidence action to prevent certain ex-members of the security services from disclosing national secrets. The author of the book, *Spycatcher*, Peter Wright, had been a member of MI5, a British security intelligence organisation. On his retirement he moved to Australia and wrote an account of his career in the secret service despite the fact that former members of MI5 owe a lifelong duty of confidence to the Crown.

Both cases involved newspapers, which printed extracts from the *Spycatcher*. The House of Lords considered whether state secret should in all circumstances be treated as confidential. Ultimately, the injunctions against the *Guardian* and the *Observer* were refused. The law of breach of confidence was not used to prevent these newspapers reporting the contents of the book. Publication of the *Spycatcher* in the United States had destroyed the confidential nature of its contents. The Court considered that no further damage could therefore be done by publishing information quoted in the book.

There can be little doubt that in this country Peter Wright would be guilty of an offence under section 105 for revealing defence secrets in his book.

iii. Where a person collects information, articles, documents or processes with intent to surrender them to a foreign power, where advantage could be taken of such collection to injure the defence of the nation.

Under this head it must be proved that the things were collected with the intention of giving them up to a foreign power. So long as the collected items

⁴¹ [1990] AC 109.

could be used to injure the defence of the nation, it is immaterial that they are not part of defence secrets. The offence is committed as soon as the act of collecting takes place. It is therefore unnecessary to show that whatever was collected was actually surrendered to a foreign power.

iv. Where a person intrudes by any deceitful means into any installation, ship, aircraft or vehicle employed in the defence of the nation.

This offence is committed as soon as there has been an intrusion, for whatever reason, by deceitful means into the place or receptacle used in the defence of the nation. The purpose and time of the intrusion are immaterial. The accused may have entered in broad daylight and simply to admire the place or receptacle. He is nonetheless guilty. The type of deceitful means resorted to is also immaterial: disguise, use of false documents, passing off for someone else, telling lies, using tricks, concealing oneself, or any subterfuge or stratagem whatsoever.

However, a forcible entry or an entry through bribery may well be an intrusion but it would not be an entry by 'deceitful means'. It is of no moment whether the intruder is a citizen, a resident or a foreigner. The offence presupposes that the intruder is a person to whom access to the installation or receptacle concerned is prohibited and who consequently resorts to deceit to gain admission therein. But even a person who ordinarily has access to any of those places may be guilty of the offence if he uses deceitful means to gain ingress at a time when he is not supposed or expected to be there.

v. where a person carries out any drawing, survey or photographic or topographical operation within any defence installation or within any prohibited area around it as laid down by the defence authorities and without their permission.

This provision does not punish, as its infelicitous draftsmanship appears to suggest, the making of just any drawing etc while within the prohibited place (e.g. drawing the setting sun). It punishes the drawing etc of any defence installation or any prohibited place⁴². There must be displayed in the prohibited vicinity or defence installation a public notice indicating that the area in question is off limits. If the accused was authorized by the defence authorities to do the drawing, survey etc he clearly commits no offence. However, the onus is on him to show that he had the permission of the defence authorities to do what he did.

'Drawing' includes copying or making a sketch. The word 'survey' is not confined to the technical process of finding and recording the area and features of a piece of land by trigonometric measurement and/or calculation using a theodolite. It includes any careful look, inspection or examination of the defence installation or prohibited area around the said defence installation.

⁴² Such a place includes defence works, arsenals, dockyards and many other places occupied by or on behalf of the State.

‘Photographic’ operation includes taking photographs or videotaping.

The offence is committed only when the accused committed the forbidden act while ‘*within*’ the defence installation or within the prohibited area around it. In other words, he must have entered therein. But it matters not that the entry was authorized, for what this provision punishes is not unauthorized entry but unauthorized carrying out of any drawing etc. operation.

Furthermore, the offence is not committed if any of the forbidden acts is carried out not while within but while outside the prohibited place, as where a person draws, surveys or photographs from a distance. This offence punishes neither reconnoitering nor the act of surveillance, or the fact of merely approaching the out-of-bounds place or area.

vi. Where a person loiters within a fixed distance prohibited by competent authority around a defence installation.

The parameter of the prohibited area must of course be clearly indicated. One way in which this is often done is by a conspicuous public notice posted up at the approaches of the defence installation indicating that loitering within the area is prohibited. Another method is simply by fencing off the area. In the absence of evidence that the area in question is off limits the charge would be bad for vagueness. The term ‘competent authority’ is wider than ‘defence authority’, which is only one of many competent authorities in the state. The word ‘loiter’ means ‘stand by’ or ‘hang around idly’. It suggests that the offence is committed only where the person is within the prohibited neighbourhood for some length of time. The provision does not therefore catch the person who momentarily enters or goes through or over the prohibited zone. But, provided there is loiter (i.e. hanging about or idle lingering) it matters not that the accused was on foot, in a vehicle, or in any conveyance whatsoever.

vii. Where a person flies without permission in a foreign aircraft over the territory of the Republic.

This offence appears to target the crew of, rather than the passengers in, a foreign aircraft. A foreign aircraft is one having a foreign nationality, that is, it is one that is not registered in this country. The designation of the aircraft is immaterial. It may be civil or military, cargo or passenger, a glider or a jet, for sports or business, or flown by more than one person or by just a single person. But the term aircraft does not include a hang-glider. The right of foreign aircrafts to fly over national airspace is largely governed by that branch of international law known as ‘air law’.

viii. Where a person sets up secretly a means of correspondence or of long distance transmission liable to injure the defence of the nation.

The means of correspondence or long distance transmission must be one *liable*

to injure the defence of the nation. But it is not a requirement that the defence should in fact have been injured. Any means of correspondence or long distance transmission whatever suffices provided it is set up secretly. A listening device is not a means of correspondence and so does not fall within the mischief of the provision.

ix. Where a person exposes, by any activity not approved by the government, the Republic to reprisals.

This offence borders on the vague. It punishes any unapproved activity of any kind that exposes the Republic to reprisals of whatever nature (economic, military or diplomatic), from whatever provenance, and for whatever reason.

x. Where a person enlists or undertakes training, without prior permission of the competent authorities here, in the armed forces or police forces of a foreign country and engages in activities injurious to the defence of the nation or in activities capable of eventually exposing the Republic to a rebellion or an insurrection.

This provision in fact creates two offences: enlisting in a foreign army or police, and undertaking training in a foreign army or police. The 'and' in the provision is conjunctive not disjunctive: the accused must have enlisted in the foreign army/police and also engaged in the injurious activity; he must have undertaken training in the foreign army/police and also engaged in the injurious activity.

Only a citizen, not a foreigner, may be prosecuted under this provision. A foreigner owes no duty of allegiance to this country and is not under its protection. He is free to enlist or train in a foreign army/police without prior permission from here. However, if after enlisting or training in the foreign army/police the foreigner engages in activities injurious to the defence of the nation he can be prosecuted under this provision on the basis of the protective principle in international law if he is arrested in this country or extradited thereto. This provision would catch the citizen who enlists in a foreign army/police as a mercenary only if the citizen goes further and engages in activities injurious to the defence of the Republic. The provision does not criminalise mercenarism *per se*.

Each of the above offences is punishable with imprisonment for from 1 to 10 years or with fine of from 100 000 francs to 10 million francs, or with both such imprisonment and fine.

2. Those punishable by imprisonment of up to 5 years

Section 106 punishes the following nine offences committed in time of peace:

i. Where a person carries on with the agents of a foreign power a course of communication liable to injure the defence or diplomatic position of the Republic.

The phrase ‘course of communication’ suggests that there must be some continuity.

ii. Where a person recruits or enlists, within the territory of the Republic and without the permission of the government, any person for any foreign armed forces.

Presumably, recruitment or enlistment for a foreign police service is not an offence under this provision. Nor is recruitment or enlistment outside this country. But, provided the recruitment or enlistment is within the national territory and without government permission the offence is committed whether the persons recruited or enlisted are citizens or foreigners.

iii. Where a person exposes, by any activity not approved by the government, any citizens to reprisals.

iv. Where a person surrenders or communicates to a foreign power or its agents, without permission from the government, any invention connected with the defence of the nation, or any information, study or process regarding such an invention, or any industrial application connected with the defence of the nation.

v. Where a person permits, by rashness, carelessness, or breach of any regulation, the removal or observation, whether in whole or in part, and for however short a time, of any article, equipment, document or information entrusted to him or in his care, and knowledge of which is liable to lead to the discovery of a defence secret.

This is a non-intentional offence. The prosecution is not required to show that the accused intentionally permitted the removal etc. All he need prove is that the accused acted rashly, carelessly or in breach of a regulation.

vi. Where a person permits, by rashness, carelessness, or breach of any regulation, the damage or destruction of any object, equipment or document entrusted to him or in his care, where such damage or destruction is prejudicial to the defence of the nation.

This is also an unintentional offence. The prosecution need only prove that permitting the damage or destruction was done rashly, carelessly, or in breach of a regulation.

vii. Where a person being in control of any supplies, concern or undertaking on behalf of the armed forces, or being agent for any supplier or a subcontractor, causes the service to fail or to be delayed, be it merely by carelessness.

viii. Where a person being in control of any supplies, concern or undertaking on behalf of the armed forces commits a fraud in respect of the description, the quality or the amount of works, of labour or of articles supplied.

ix. Where a person enlists or undertakes training, without prior permission of the competent

authorities here, in the armed forces or police forces of a foreign state.

Clearly, this offence can be committed only by a citizen, not a foreigner; for there is no compelling reason why the foreigner who wants to enlist in the armed/police forces of his own country or that of another country should seek the prior permission of the government of this country. This provision catches the citizen who enlists or undertakes training in a foreign army/police force as a mercenary.

Any of the above offences carries a punishment of imprisonment for from 1 to 5 years and/or a fine⁴³.

D. Misprison of treason

Any citizen who in time of peace or war *fails to inform* the defence, administrative or legal authorities, so soon as he comes to know of it, of any activity liable to injure the defence of the nation is guilty of an offence⁴⁴.

Where the offence is committed in time of peace the penalty is imprisonment for from 1 to 5 years and/or a fine⁴⁵. But where the offence is committed in time of war the punishment becomes imprisonment for from 10 to 20 years. There is no option of a fine. The enhanced penalty in this case is because in time of war there is a more onerous duty on the citizen not to forbear to disclose any activity he knows of that is liable to injure the defence of the nation. The country being at war, its very existence is at stake. Failure to report may operate to the benefit of the enemy.

The offence of failure to report, be it noted, is a crime of omission to act and may be committed only by a citizen, never a foreigner. It may be committed in time of peace or war. There is therefore a continuing duty on every citizen of the age of criminal responsibility to report, at all times, any activity he knows of that is liable to injure the defence of the nation. Information about any such activity must be made to 'the defence, administrative or legal authorities'. 'Defence authorities' refers to the disciplined forces, that is, the military (army, navy and air force) and police forces. 'Administrative authorities' include mayor, local council chairperson and village chief; and 'legal authorities' include the court and the department of public prosecutions.

This section does not impose a general obligation on the citizen to report any criminal activity he knows of. Rather, the duty here is the specific one to report only such activity as is liable to injure the defence of the nation. Since

⁴³ The minimum fine under the section is 50,000 francs and the maximum is 5 million francs.

⁴⁴ Sections 107 and 108 (2)(b). This offence is akin to the old crime of 'misprison of treason' under English law and to 'concealment of treason' under the law of some jurisdictions. The entry in the Osborne Concise Law Dictionary states that misprison of treason is where a person who knows that some other person has committed treason does not within a reasonable time give information about it to a magistrate or other authority.

⁴⁵ Of from 50,000 to 5 million francs.

one cannot report what one has no knowledge of, a person is not guilty of the crime if he was not aware of the injurious activity or of the fact that the activity in question is even injurious to the defence of the nation. But if he knows, the law requires him to give prompt information of what he knows to the appropriate authorities. However, his duty is limited to giving prompt information. So long as he gives with reasonable dispatch the piece of information in his possession he would have discharged the legal duty imposed on him.

There is no requirement that he does anything further than just informing. He need not go out of his way to endeavour to prevent the impugned activity or to apprehend the perpetrators. The law makes no demand of heroism from citizens. The citizen would have discharged his public duty once he gives the information he has. It is then up to the public authorities to take such action as they deem expedient in the circumstances. Should they fail to act on the information supplied it is their look out, not that of the citizen.

There is some uncertainty as to the scope of this crime. Is it confined to the case of the citizen who knows of a planned activity liable to injure the defence of the nation, and who, without approving or assenting to it or assisting in it in any way whatever, yet forbears to disclose what he knows? Or does the crime include concealing an activity known to have been undertaken and liable to injure the defence of the nation, as well as mere silent observation of the carrying out of the activity without using any endeavour to inform the appropriate authorities? It is submitted that the crime is couched in terms sufficiently wide to cover both situations. So long as the activity in question is one liable to injure the defence of the nation, the citizen who is aware of it must, under pain of punishment, disclose to appropriate authority all material facts known to him relative to the said activity, whether still in the preparatory stage, execution stage, or already executed.

§2. Secession

By s.111 a person is guilty of secession if he “undertakes in whatever manner to infringe the territorial integrity of the Republic.” The territorial integrity of a state may be infringed in a variety of ways: ceding a part of the state to a foreign power, procuring the breakaway of a part of the state, placing the state under the sovereignty of another state, expanding the frontiers of the state by grabbing territory belonging to another state, uniting the state with another state, etc. Secession is thus only one way by which the territorial integrity of a state may be infringed. Going by the title of the section it would seem the section only punishes the person who endeavours to procure the breakaway of any part of the Republic. Like the cognate crimes of civil war, revolution and insurrection, secession is a species of treason. The law against secession is

meant to protect the state's territorial integrity, existence and independence⁴⁶.

Section 111 punishes the act of *undertaking* to infringe the territorial integrity of the state, that is, a mere attempt or an endeavour to do so. A bare consultation with a view to infringe the territorial integrity of the state does not come within the section, but a conspiracy to do so probably does. What the section actually punishes is an *attempt* to infringe the territorial integrity of the state. This makes sense because where a secessionist bid succeeds the perpetrators become leaders of the nascent state and beyond the reach of the law of the parent state on account of the general principle of territoriality of criminal law.

Circumstances under which a secessionist bid may succeed are varied. The parent state may acquiesce in the departure of the seceding entity as in the case of Singapore's secession from the Federation of Malaysia. The parent state and the seceding entity may negotiate a peaceful separation as happened in Czechoslovakia and in the Soviet Union. The seceding entity may liberate itself by taking up arms against the parent state followed by a separation referendum by the parent state in the seceding territory, as happened in the case of Eritrea when it 'seceded' from Ethiopia, and as happened in the case of the Southern Sudan. Usually, international recognition would be forthcoming if the secessionists control the seceding territory and establish a government, as happened in the case of Bangladesh, Kosovo and Somaliland.

Secession as such need not be illegal. There are circumstances under which it may be legitimately undertaken. There may be a constitutional right to secede. For example, such a right is available under the Ethiopian Constitution in terms of which any sub-national entity may secede after going through a laid down procedure. Quebec has twice attempted to secede constitutionally from Canada. Secession may be permissible, or at least acceptable, under international law. Thus, secession would seem legitimate in the following circumstances: to undo past injustice when a distinct people has a legitimate claim to territory that was wrongly annexed by some state (this was the basis of the claim to independence from Russia by the erstwhile, but now independent, soviet republics; it was the basis of the East Timorese claim to Independence from Indonesia, and it is the basis of the claim to independence by the Southern Cameroons from Republique du Cameroun- the applicable law in all such claims evidently being international and not municipal law); to undo present repression when a distinct people or minority is systematically repressed within an existing state or subjected to ongoing gross violation of human rights; and when multi-ethnic, multi-republic or country states break up

⁴⁶ Historical note: 'Republic' here refers to the conjoined territories comprised in the state that went by the name and style of Federal Republic of Cameroon. For, on 1 October 1961 a de facto federal republic came into existence, constituted by the Southern Cameroons and Republique du Cameroun. The Penal Code came into force in 1966 as the Federal Penal Code.

into component parts as part of the overall dissolution of an existing state.

Secession *per se*, as distinct from the use of unconstitutional means to bring it about or in the absence of a legitimate right to secede, can never become a crime for the simple reason that state boundaries are not sacrosanct. Permissible alteration of state frontiers may take place in a number of ways. For example, as the result of agreement to that effect among limitrophic states, or as a result of a boundary delimitation effected by a mixed demarcation commission, or by a state seceding or acquiring territory as happened when Alaska was sold by Russia, and Louisiana by France, to the USA; or as a result of the exercise of a constitutional or legitimate right to secede (i.e., the exercise of the right of self-determination). If secession *per se* is an offence on the reasoning that it infringes the territorial integrity of the state, then by parity of reasoning territorial union or incorporation must also be an offence, for in either case the state's territorial integrity is affected. The fact of the matter is that the territorial dimensions of a state may expand or shrink, or the state may even become extinct. Much depends on the vicissitude of the state's history and the political fortunes of those at the helm of affairs.

In order to secure a conviction under the section the prosecution must prove that there was an *undertaking* to *infringe* the *territorial integrity* of the *Republic*. Each of the four elements in italics must be proved. Was there an undertaking and what did it consist of? Was there an infringement? How was it and what did it consist of? What is meant by territorial integrity? The prosecution must show that the territorial framework that the section seeks to protect consists of the rightful territory of 'the Republic' since the law cannot seek to protect an illegal or unlawful state of affairs. And what Republic does the section contemplate? Every state has international boundaries and, regarding African States the Constitutive Act of the African Union imposes a treaty obligation (Article 4 b) on each Member State to respect the boundaries it inherited from colonisation as they stood on the day of achievement of independence. The territorial integrity of a member State of the African Union is thus the integrity of its territorial framework as it stood on the date it achieved independence. Any claim to territory outside that territorial framework is expansionism and impermissible under international law.

The punishment for 'secession' attempted in time of peace is life imprisonment, and, in time of war, state of emergence or siege, is death by hanging or shooting.

§3. Civil war

"Whoever provokes civil war by arming the people, or by inciting them to take arms against each other, shall be punished with death"⁴⁷.

In international law a war is an inter-state armed conflict. Where the armed

⁴⁷ Section 112.

conflict is between opposing groups within the same state or between organised dissident forces and the armed forces of the state, the conflict is a 'civil war'. But where under the leadership of a responsible command an organised armed group or groups in a territory under colonial rule is fighting the colonial power to free the territory from colonial occupation, that armed conflict is known as a war of national liberation. Non-international armed conflicts (i.e., intra-state armed conflicts) are not beyond the reach of international humanitarian law. The provisions of article 3 common to the four 1949 Geneva Conventions and Additional Protocol II thereto also apply to them.

Provocation. Civil war is 'provoked' within the meaning of section 112 by the fact of either arming the people or by inciting them to take up arms against each other. The offence is that of provoking (i.e., engineering, inciting) civil war and so it need not be shown that civil war actually took place. Provocation is proved by evidence showing either that the people were armed or that they were incited to take up arms against each other. Provocation to take up arms does not require that the incitement must have taken a particular form. It is immaterial how the incitement is done. It may be by speech, broadcast or writing, or even by action such as a premeditated targeted attack designed to spark off a civil war.

Arming. To arm means to provide, supply or equip with weapons. It would be very surprising indeed if the word 'arms' were to be construed to mean only a gun or an arm properly so called. Such a construction would mean a civil war could be fought only with guns. It is submitted that 'arms' bears a wide meaning embracing not only guns (of whatever description) but also weapons such as cutlasses, machetes, bows and arrows, spears, knives, sticks, stones, catapults, poison and any incendiary or explosive device. To arm the people to engage in violence is to provoke civil war. It need not be shown that all the people that is, the entire population, were armed. It is sufficient if only a section of the population was. Provided such arming evinces a clear intention to provoke a civil war. No offence is committed if a section of the population is armed to defend itself in the eventuality of an anticipated armed attack from another section of the population.

People. The word 'people' includes part or a section of the people. It does not bear the special meaning in international law of a distinct group with its own territory, culture, history, language, and a sense of common belonging. Hence, it is not necessary to show that the entire population of a country was armed or incited. Provoking tribal war among two or more tribes is still provoking civil war, for a civil war is an armed conflict between groups within the state

and need not involve the entire country. However, fighting between different political or religious factions or groups within the state is a civil strife only though such a situation can easily slip or degenerate into civil war.

§4. Revolution

By section 114, whoever by force *attempts* to alter the laws composing the constitution, or to overturn the political authorities set up by the said laws or to render them incapable of exercising their powers shall be punished with imprisonment for life.

This offence merely punishes an attempt; an attempt to overthrow the government of the day by unconstitutional means such as an attempted *coup d'état* or an attempted armed uprising or rebellion. It is well to remember that a revolution is always an unlawful overthrow of the existing constitutional order. Despite its wording the section cannot be interpreted as aimed at any conduct other than an attempt, a plot or a conspiracy to overthrow the government by violence, that is, by unconstitutional means.

A government can legitimately be overthrown by constitutional means. Indeed, the aim of the opposition in a multiparty democracy is, by lawful means, to overthrow or bring down the government of the day and assume power. Thus attempting to bring down a government through such lawful means as political campaigns, a vote of no confidence in parliament, floor crossing in the House, showing that the government has been misled or is mistaken in any measure in the country, or public opinion campaigns to persuade the people to bring about by lawful means a change of government cannot possibly be an offence. Even the overthrow of a government by popular uprising (as in Egypt, Libya and Tunisia recently) is legitimate and even lawful because ultimate power vests in the people who may use it as they see fit.

Furthermore the political authorities may legitimately be rendered incapable of exercising their powers as may happen where there is a hung parliament or a lawful general strike by workers or a serious disagreement between head of state and commander-in-chief of the armed forces, on the one hand, and the prime minister and head of government, on the other hand.

The section 114 offence is one of attempt only. This is sensible. For, if the government is successfully overthrown (as in the case of many insurgencies and military coups d'état in the continent) the insurgents become the new masters and are assured not only of impunity but also of 'glory' and power. The very success of the revolution vindicates and legitimizes the means employed. The ousted leaders become prisoners and possibly face the scaffold. The hunters become the hunted, as it were.

This offence differs from all others in this chapter in that it is aimed at protecting a regime's authority, interest and safety, rather than the peace,

tranquility, interest and survival of the state. Further, the offence differs from the crime of sedition as known in some jurisdictions. Sedition involves actively urging the overthrow of the government. Its purpose is the same as treason. However, the crime of sedition lacks the element of an overt act required in the crime of treason. Moreover, the mere discussion of revolution as a philosophical matter or as a jurisprudential topic, as is done in the academia, is not sedition.

§5. Armed band

Section 115 punishes three distinct types of conduct: (i) forming an armed band either with intent to make a secessionist bid, to provoke civil war, to overthrow the republican constitution, or with intent to hinder the operations of the forces of order against those committing any of these crimes; (ii) holding any office or command in such an armed band; and (iii) joining such armed band in committing or attempting to commit any of the aforementioned offences.

The word ‘band’ presupposes an organized group of people doing something with a common purpose and having a leader and other officials. In other words there has to be an element of formal organization and continuity so that it is possible to speak of persons holding any office or command in it. ‘Band’ does not include an insurrectionist mob such as a spontaneous uprising by a crowd or a mass of people to oust a regime from power. An ‘armed band’ means “any gathering of five or more persons of whom any one bears arm, open or concealed”⁴⁸.

There is no magic about the number ‘5’, but the words “shall mean” in section 115(3) clearly indicate that if fewer than five persons are gathered they do not constitute an armed band within the meaning of the section even if all those fewer persons are armed. There must be at least five persons, organized, to constitute a ‘band’. It is immaterial whether the band is secret or in the open. The said band is ‘armed’ even if only one of the five persons is carrying an arm and even if the said arm is concealed.

It is well to remember that section 115 punishes *forming* an armed band with the requisite ulterior motive or oblique intent, *holding* an office or command in such a band, and *joining* the band in committing or attempting to commit any of the specified offences. Thus it is the forming, the holding or the joining that is punishable, and not any commission of the specified crimes as such⁴⁹. The person who forms or joins an armed band or who holds an

⁴⁸ Section 115 (3).

⁴⁹ Where any of these specified crimes has been committed it should be prosecuted under the appropriate section and not under s.115.

office in it is punishable with life imprisonment. Any other member of the band is punishable with imprisonment for from 10 to 20 years⁵⁰.

In view of the fact that section 115 (1) does not punish the mere constitution without more of an armed band⁵¹ the exact criminal law basis for punishing other members of the armed band is not altogether clear. They are not principals or co-offenders⁵² and the law of accessory-ship could come in only if abetment can be shown⁵³, except of course, if section 115 (2) is construed as implying that in the circumstances there is necessarily abetment.

A member of the armed band is entitled to an absolute discharge if he betrays his fellow band members by preventing the execution of the intended offence or by informing, before any attempt at execution, the administrative or judicial authorities of any criminal design of the armed band⁵⁴.

§6. Insurrection

Section 116 punishes with imprisonment for from 10 to 20 years any person who, *during an insurrection*: (a) instigates or encourages by whatever means the gathering of the insurgents; or (b) hinders by whatever means the summoning, the assembly or the operations of the forces of order, or usurps their command; or (c) invades or destroys any public or private building; or (d) holds or seizes any weapon, ammunition or explosives; or (e) wears any official uniform, garb or emblem, whether civil or military.

The term 'weapon' in this section includes both an arm properly so-called and any other article carried with intent thereby to inflict bodily harm or material damage⁵⁵. Although section 116 is entitled 'insurrection' the section does not in fact punish insurrection. What the section does is to punish certain acts committed 'during an insurrection'. It is thus these acts that are, and not the insurrection itself which is, punishable. Further, the said acts are punishable only during an insurrection. The existence of an insurrection (however or by whom it has come about) is thus a condition precedent for the punishment of the acts mentioned in the section.

An *insurrection* is a sudden, usually violent, action taken by the population or part of it to try to remove the government. It is a mob uprising or revolt for some general public purpose such as to effect an alteration of the law or to

⁵⁰ Section 115(2).

⁵¹ An armed band may legitimately be formed for a variety of lawful purposes, for example, for self-protection (body guards), for protection of property or premises (security guards), or for protection of the neighbourhood (neighbourhood watch or vigilantes).

⁵² Cf. section 96.

⁵³ Section 97.

⁵⁴ Sections 115(4) and 95(5).

⁵⁵ Section 117.

effect a change of government, or even for some limited or local purpose⁵⁶.

Being a revolt or rebellion against the status quo, an insurrection is in fact a revolution. If it succeeds the legal order valid until then, including the constitution is swept away and the leaders of the old regime become liable to prosecution for various crimes or even to face the gallows without any trial at all. The very success of the insurrection legitimizes the revolt, the rule, the power and the actions of the insurrectionists. But if the insurrection, the revolution, fails the existing constitution and legal order remain in force, the status quo continues and the leaders of the failed insurrection become traitors under the norms of the existing legal system and liable to punishment as such.

⁵⁶ Depending on the circumstances, an insurrection may be prosecuted as ‘riot’ under ss.232, 233, or 234.

Offences against the Constitution

This chapter does not deal with offences against the constitution in a wide sense. Treason, treachery and other treasonable crimes such as the disclosure of state secrets and the violent overthrow of the government are pre-eminently offences against the constitution. But they are not dealt with under this chapter. The chapter rather focuses on offences against certain constitutional principles.

First, there is the principle of a democratic state or government. In the contemporary world the working of democracy is governed by one general principle, which is that the election of representative institutions is the basis of the democratic management of public affairs. The conditions for holding elections and under which elections are held are therefore of paramount importance. Hence there is need to safeguard the electoral process by punishing electoral fraud⁵⁷ and electoral corruption and violence⁵⁸.

Secondly, there is the principle of the vertical separation of powers between the legislature, the executive and the judicature. One signaled pillar on which democracy rests is the fact that governmental functions must be allocated to separate and autonomous institutions charged with lawmaking, law-execution and law-administration. This dispersal of the governmental function promotes democratic participation in the governance of the state and prevents the tyranny that would inevitably result from the confusion and concentration of all three functions in one person or institution. The Penal Code therefore punishes any trespass on one branch of government by a person belonging to another branch⁵⁹.

Thirdly, there is the doctrine of the paramountcy or supremacy of law. This is an aspect of the rule of law and entails that the law must be obeyed by all otherwise cooperative existence in society would become impossible. The Penal Code punishes any conspiracy to subvert the law⁶⁰. It also punishes obstruction of the enforcement of any law, whether the obstruction is by the use of force⁶¹ or is by way of nonfeasance⁶².

§1. Electoral fraud

Section 122 deals with four types of electoral frauds, the commission of which

⁵⁷ Section 122.

⁵⁸ Section 123.

⁵⁹ Sections 125-127.

⁶⁰ Section 124.

⁶¹ Section 128.

⁶² Section 129.

may be intentional⁶³ or unintentional⁶⁴. By section 122(1), whoever in any federal, federated or local election (a) violates the secrecy of the ballot; or (b) affects the genuineness of the election; or (c) obstructs the counting of votes; or (d) alters the result, is guilty of an offence.

Three types of elections are envisaged, all of them public elections: national⁶⁵ elections, any election at federated-state level⁶⁶, and local council elections⁶⁷. Private elections are outside the contemplation of the section. Elections such as those within various associations⁶⁸, various institutions⁶⁹ and smaller territorial units such as the village, are not covered.

Secrecy of the ballot is an internationally long recognized mechanism for insulating the voting process from intimidation and terrorization of the electorate. It involves everything from the design of ballots, ballot boxes and voting compartments to legal provisions establishing that the vote is secret and not to be disclosed. A person who, without proper authority, opens a sealed or locked box of ballot papers or who makes unauthorized marks on ballot papers so as to identify voters and how they voted, is just as guilty of violating the secrecy of the ballot as a person peeping in an enclosed voting compartment to monitor the voter selecting a ballot paper before coming out to cast it in the ballot box, which these days is a transparent box. The right to vote is empty when elections are not free, fair and transparent.

Genuine elections are those which offer a real choice to the electorate and which reveal and give effect to the freely expressed will of the people. The non-competitive ‘elections’ or ‘referenda’ in a one-party dictatorship or in authoritarian regimes are obviously not genuine elections. In those types of political dispensations the electorate is never given any choice at all and its will is never freely expressed. The ‘results’ of such ‘elections’ cannot be said to be a reflection of the wishes of the people. The regular fixing of election results in pseudo-multiparty systems, in autocratic systems, or in one-party or authoritarian systems affect the genuineness of ‘elections’ under those systems. The perpetrators can (theoretically) properly be prosecuted.

Obstructing the counting of votes can take various forms. For example, preventing the vote counting exercise from starting, causing unwarranted delays in or postponement of the counting of the votes, hijacking or stealing

⁶³ Section 122 (1).

⁶⁴ Section 122 (2).

⁶⁵ That is, presidential elections, legislative elections including senatorial elections, and nation-wide referenda or plebiscites.

⁶⁶ That is, elections at regional and sub-regional level such as a gubernatorial election and election to the regional assembly.

⁶⁷ These are held to elect mayors and councillors.

⁶⁸ E.g., political parties, trade unions, professional organizations, clubs, cultural or sports associations, thrift associations, and NGOs.

⁶⁹ E.g. schools, universities, and any deliberative chamber.

one or more boxes of ballot papers, persistent interruption of counting under way either by noise-making within the vicinity of the place where the vote counting is taking place or by forcing one's way into the counting room when one has no right to be there.

Altering results include tempering with the figures on the counting sheet or computer, stuffing the ballot box, destroying or concealing votes already cast, and abstraction of votes already cast.

The prescribed penalty for each of these offences is imprisonment for from 3 months to 2 years and/or a fine⁷⁰. The penalty is reduced where the result was unintended, albeit that the offender willfully disregarded the law⁷¹. In either case the court may additionally impose, for a period of 5 to 10 years, the forfeitures spelt out in section 30⁷².

The prosecution of any of the offences under s.122 is barred by the lapse of 4 months from the commission of the offence or from the last step in prosecution.

§2. Electoral corruption and violence

A person is guilty of an offence who “(a) by grant or promise of any individual advantage; or (b) by interference or by threat of any kind of individual disadvantage, influences the vote of any elector or induces him to abstain from voting”⁷³. ‘Elector’ is synonym for ‘voter’.

It must be shown not only that the accused ‘granted or promised’, or ‘interfered or threatened’ but that in consequence of any of these acts the elector’s vote was influenced or the elector was induced not to vote. However, although the ‘grant or promise’ must be of an ‘individual advantage’ and the ‘interference or threat’ of an ‘individual disadvantage’, the advantage or disadvantage may be of any kind or nature. Moreover, the beneficiary of the advantage or the person who suffers the disadvantage need not be the elector personally but some third party such as a spouse, child or relative.

There is one procedural matter in this section that invites comment. The section punishes anyone who ‘by grant or promise’ or ‘by interference or by threat’ ‘influences ... or induces ...’ Does each of these pairs of acts constitute a single offence or does each pair involve two distinct alternative offences? If each pair involves just a single offence then the ‘or’ is merely conjunctive not disjunctive. A charge of a single offence in each case will be good and it will not be necessary that the ultimate verdict should be one only of this act or only of the other act. On the other hand, if each of the above pairs of acts involves two distinct alternative offences, a charge as a single offence will be bad for

⁷⁰ Of from 10 000 to 100 000 francs.

⁷¹ Section 122 (2).

⁷² Section 130.

⁷³ Section 123 (1).

duplicity.

There is a difference, no doubt, between ‘grant’ and ‘promise’, between ‘interference’ and ‘threat’, and between ‘influence’ and ‘induce’. But these pairs of words appear to be more in apposition than in opposition. What is more, ‘promise’ can be subsumed under ‘grant’⁷⁴, ‘threat’ under ‘interference’⁷⁵, and ‘induce’ under ‘influence’. In the result, it is submitted that each pair of acts in s.123(1) involves just a single offence.

The prescribed punishment for an offence under s. 123(1) is imprisonment for from 3 months to 2 years and/or a fine⁷⁶. The penalty is significantly reduced where the vote influenced is that of an electoral college or constituency or of any section thereof⁷⁷. This is surprising. One would have thought that corrupting several voters is more blameworthy and deserving of a heavier punishment than in the case where only one elector is involved.

Upon convicting and sentencing an offender to a term of imprisonment and/or fine under this section the court may impose for from 5 to 10 years the forfeitures listed in section 30.

§3. Agreement to subvert the law, the operation of a public service, or state security

Section 124(1) punishes with imprisonment for from 6 months to 3 years, “Any person in whom is vested any part of public authority, and any public servant, who with any such person concert or determines (a) any measure contrary to law or to any regulation lawfully issued there under; or (b) any measure, including collective resignation, designed primarily to obstruct or to interrupt the carrying on of a public service”⁷⁸.

The offences in section 124 might well be described as conspiracies, for they punish agreements or resolutions to carry out any of the mischief set out in the section. An offence under the section is however committed only where the ‘concert’ or ‘determination’ (that is, the agreement or resolution) is between “persons in whom is vested any part of public authority”⁷⁹ and ‘public

⁷⁴ As where A tells B, “This TV set is yours. Come and pick it up next week. I only ask that you vote for me.” There is here both a ‘grant’ and a ‘promise’.

⁷⁵ As where A assaults B by way of threat.

⁷⁶ Of from 10 000 to 100 000 francs.

⁷⁷ Section 123(2). The court may pass the minimum sentence, which is 6 months’ imprisonment and/or fine of 25 000 francs.

⁷⁸ The prescribed penalty is imprisonment for from 1 to 10 years where the concert is between the civil and military authorities. The death penalty is mandatory where the object of the concert between the civil and military authorities is a felony against the security of the state. On conviction under section 124 the court may also impose for from 5 to 10 years the forfeitures described by section 30.

⁷⁹ These include: head of state, prime minister, minister, governor, district officer, parliamentarian, mayor, local councillor.

servants'⁸⁰, or between any of these *inter se*. But the number of persons of that description combining for any of the specified objects is immaterial.

It is well to note that under section 124(1)(b) it must be shown that the measure concerted or determined was 'designed primarily' to obstruct or to interrupt the carrying on of a public service. The accused cannot be convicted if obstructing or interrupting a public service was a secondary object, as where there is a collective resignation to press a claim.

§4. Trespass on the legislature

By section 125 "Any public servant who (a) assumes the exercise of legislative power; or (b) refuses to enforce any provision of law, shall be punished with imprisonment for from 6 months to 5 years"⁸¹. The offences are capable of being committed only by a person having the status of 'public servant'.

The offences under this section are somewhat vague. First, the term 'law' embraces Acts of Parliament, ordinances, statutory instruments, and executive decrees and orders and, typically in common law jurisdictions, judicial precedent. A judicial officer may legitimately refuse to enforce or to give effect to any law or provision of a law that is unconstitutional or that violates international law. In such a case he cannot be guilty of an offence under section 125(b).

Secondly, legislation is not the monopoly of the legislature. It is shared between parliament and the executive. In fact, in countries that have modeled their constitutional system after that of France, parliament is empowered to legislate only in respect of those matters specifically listed in the so-called legislative domain while the residue, unspecified, is made the subject of rulemaking by the executive. In those countries the republican President regularly churns out decrees. His ministers and administrative officers frequently issue orders.

Decrees and orders are also laws in the material sense of the term and those who issue them certainly exercise legislative power when so doing. Are they guilty of an offence under section 125(a)? It is doubtful that they are. Their conduct is a constitutionally permissible exercise of legislative power.

§5. Trespass by executive and judiciary reciprocally

It is an offence for anyone who is the representative of the executive authority⁸² to issue any order or prohibition to any court⁸³. Likewise, it is also an offence for any legal or judicial officer to issue any order or prohibition to any executive or administrative authority. The punishment for either offence is

⁸⁰ Section 131 gives a long and involved definition of 'public servant'.

⁸¹ By s. 130 the court may also impose the forfeitures described in section 30.

⁸² President, Minister, regional premier or governor, mayor, etc.

⁸³ Including, of course, a customary court.

imprisonment for from 6 months to 5 years.

Section 126(b) does not in terms refer to ‘court’, but rather to ‘legal’ or ‘judicial’ officer because ‘court’ is not a natural person and thus cannot be proceeded against criminally. However, it is hard to conceive of a situation in which a judicial officer could possibly issue an order or a prohibition against any executive or administrative authority other than while sitting as a court. An order or a prohibition by a judge or magistrate is a judicial rather than a ministerial act. Without saying so in express terms, section 126(b) in effect makes it an offence for the court to issue an order or a prohibition to any executive or administrative authority. This is surprising. The High Court (i.e. a Judge of that Court) has power, under its equitable jurisdiction, to issue injunctions, and power to issue orders of habeas corpus, certiorari, prohibition and mandamus⁸⁴.

§6. Trespass by judiciary on particular immunities

Section 127 enacts: “Any judicial, legal or investigating police officer who contrary to any law conferring immunity prosecutes, arrests or tries a member of the federal or a federated Government, or of the federal or a federated Assembly, shall be punished with imprisonment for from 1 to 5 years⁸⁵.”

This offence pre-supposes the existence of a law granting immunity to members of government and members of parliament. Further, section 127 forbids prosecution, arrest or trial of a parliamentarian. In *Frederick Ngomba Eko v. Sam Mofo*⁸⁶ the respondent was a Member of Parliament in the West Cameroon House of Assembly. The police charged him with assault. He claimed parliamentary immunity. Two police officers, acting under the instructions of Mr. F.N. Eko, the Chief Law Officer for West Cameroon, nevertheless continued investigations into the matter. The MP instituted private prosecutions in the Bamenda Magistrate’s Court against Mr. Eko and the two police officers for attempting to prosecute him contrary to s.127 as read with s.94 of the Penal Code. The Chief Law Officer promptly discontinued the private prosecution by entering a *nolle prosequi*.

The learned trial magistrate stated a special case on points of law for the opinion of the West Cameroon High Court in its appellate jurisdiction. One of the points of law on which the opinion of the High Court was sought was whether the expression “the [state] intends that the proceedings shall not continue”, in section 73 of the Criminal Procedure Ordinance, includes a

⁸⁴ High Court Law, Magistrate’s Court Law, 1955; Judicial Organisation Ordinance, 1972, s. 16 (1).

⁸⁵ The court may, on conviction for the offence, also impose the forfeitures described in section 30.

⁸⁶ (1971) Appeal No. WCCA/11/71, unreported.

private prosecution. Kesiro, J sitting in the High Court at Bamenda held that the state cannot enter a *nolle prosequi* in a purely private criminal prosecution and that one of the parties against whom the private prosecution has been instituted being the Chief Law Officer cannot act for himself and at the same time for the state. The conduct of the Chief Law Officer, the learned Judge observed, offended against the basic principle of natural justice that no one shall be judge in his own cause, *nemo judex in re sua*. He therefore concluded that the *nolle prosequi* entered by the Chief Law Officer was bad in law. The Chief Law Officer appealed to the West Cameroon Court of Appeal against the opinion of the Judge. Held, (O'Brien Quinn J delivering the judgment of the Appeal Court) that the Chief Law Officer acted within his powers under the law when he ordered the discontinuance of the proceedings in the Magistrate's Court and the discharge of the defendants in the case.

Since the *Sam Mofor* case ultimately turned on the issue of whether or not the state could enter a *nolle prosequi* in respect of a private criminal prosecution, the courts missed an opportunity to pronounce themselves on the scope of the privilege of parliamentary immunity under section 127. However, it would seem that on principle section 127 does not protect an MP from search, or from questioning not involving an arrest. But it does protect him from detention since every detention involves an arrest. Parliamentary and ministerial immunities are never absolute.

Legislation granting the privilege of immunity always permits arrest and trial under certain circumstances, such as when parliament lifts the immunity of a parliamentarian. The lifting of the immunity must of course be procedurally proper. In *J.E. Sona v. Commissioner of Police*⁸⁷ the High Court quashed the conviction and sentence of the appellant, a parliamentarian in the House of Assembly in Buea, on the ground that the decision to lift his immunity as an MP was prepared and served on him long after criminal proceedings against him had been commenced, a procedure which infringed the law on parliamentary immunity. Ordinarily, the proper officer to lift the immunity of an MP is normally the Speaker of the House or, if the House is not in session, the chairperson of the Bureau of the House; but the Clerk of the Assembly as head of the office of the House could do so as well. The *locus classicus* is the above cited case of *JE Sona v. Commissioner of Police*.

The appellant, an MP in both the Federal House of Assembly and the West Cameroon House of Assembly, was convicted of corruptly receiving and of conspiracy and sentenced to nine months' imprisonment with hard labour on each count. On appeal among other grounds, it was argued that the parliamentary immunity of the appellant had not been lifted and that even if it had been lifted or was purported to have been done, it was not done by the

⁸⁷ (1962-1964) W.C.L.R. 54.

Bureau but by the Clerk of the House who was not in a position so to do and further even if the Clerk of the House had the power, he had acted after the commencement of proceedings and could not have given retrospective effect to his act. Held, that the Clerk of the House of Assembly is the head of the office of the House and could lift the immunity of the appellant but that as the prosecution had commenced prior to the letter lifting immunity the letter did not have retrospective effect and therefore the proceedings against the appellant were commenced without the relevant authority and were barred *ab initio*.

In certain cases, the MP can be prosecuted without the fiat of Parliament. This will happen where the MP is caught in the act of committing an offence or where he has committed an offence against the internal or external security of the state. Further, an MP's immunity against prosecution does not cover prosecution for simple offences (e.g. a road traffic offence). However, the detention or prosecution of an MP would be suspended as of right on motion by the House of Assembly or its Bureau if the House is not sitting,

§7. Unlawful use of force

Whoever requires or orders the intervention or the use of public force⁸⁸ against the enforcement of any provision of law or regulation, or against any lawful order, whether judicial or administrative, is guilty of an offence and liable to imprisonment for from 3 to 10 years, and and a fine⁸⁹.

Section 128 punishes the misuse of public force. Generally, it is the public servant having authority over public force who is in a position to commit the crime. Nevertheless, the offence as drafted may be committed by any person, whether or not he is in charge of public force.

§8. Non-compliance with requisition

Any commander of any public force who does not comply with a lawful requisition for its use by the civil authorities is guilty of an offence under section 129. On conviction the offender is liable to imprisonment for from 6 months to 2 years, and the court may also impose on him, for a period of from 5 to 10 years, the forfeitures described in section 30 of the Code⁹⁰.

In order to secure a conviction under s. 129, it must be shown that the accused was at the relevant time the person commanding the public force. It must further be shown that the requisition for use of the public force was lawful; that is to say, the force was required for a lawful purpose.

⁸⁸ Military, prisons service, police service.

⁸⁹ Of from 20,000 to 200,000 francs. Section 128. On conviction for an offence under this section the court may, in addition to the principal penalty imposed, also impose the forfeitures described in s. 30 for a period running from 5 to 10 years.

⁹⁰ Section 130.

Misconduct in Public Office

This chapter deals with a number of offences relating to misconduct in public office by holders of any such office. The offences under this head fall into five broad categories, namely, violence, corruption, abuse of office, culpable abstention (that is, omitting or failing to do an act required by the duties of the office), and torture.

A criminal charge will thus lie against a public officer for misbehaviour in office by demanding or receiving improper or ill-gotten gain⁹¹, for fraud or negligence in office⁹², for oppressive or illegal acts done corruptly or from improper motives⁹³, or by neglecting a duty imposed upon him by law⁹⁴.

For malpractices during the course of his work, a public officer will of course be criminally liable in the ordinary way if it can be proved that he has committed any of the offences of general application such as treason, theft, homicide, assault, sexual indecency, and so on. But over and above his liability as an ordinary citizen, a public officer may be liable to special, more severe punishment. This is so because the criminal law lays great stress on the importance, and tries to ensure the maintenance, of integrity in public life. Misconduct in public office is injurious to the common weal rather than to the corruptor. It is criminalised for the protection of the public welfare rather than for the protection of those doing the corrupting or allowing themselves to be corrupted.

The offences under this chapter are, generally speaking, those that are capable of being committed only by a person *virtute officii* (that is, in his official capacity) as the holder of a public office. In other words, they are offences that can be committed only by a person having the status of public servant.

A public servant for the purpose of the criminal law includes “any judicial or legal officer, any law official, any employee or official of the state or of any other body corporate governed by public law, or of a corporation or semi-public corporation, of a law official, any Armed Forces or Gendarmerie serviceman, any employee of the National Security or Prison Administration and any person charged, whether continuously or occasionally with any public duty, mission or task, while acting in the discharge of his office or in relation to the said office”⁹⁵.

The term ‘public servant’ is thus much wider than ‘civil servant’. The word

⁹¹ Sections 134, 134a, 135, and 136.

⁹² Sections 137-139.

⁹³ Sections 140-144.

⁹⁴ Sections 145-151.

⁹⁵ Section 131.

‘includes’ in the definition of ‘public servant’ suggests that the enumeration in section 131 is merely indicative, not definitive. For example, officers of the Department of Customs and Excise are not mentioned in the list under section 131. But there can be little doubt that those officers are also public servants. It is however doubtful that persons called to holy orders and the like come within the broad definition of public servant; for if they do simony⁹⁶ would then become a criminal offence.

Where a public servant is guilty of any felony or misdemeanour against which it is his duty to guard or take action, the fact of his position as a public servant becomes a general aggravating circumstance making him liable to increased punishment⁹⁷. Where he is guilty of certain offences enumerated in section 132(2) the same fact of being a public servant becomes a special aggravating factor making him liable to increased punishment. For example, *any public servant who uses force against any person* is liable, on conviction, to imprisonment for from 6 months to 5 years⁹⁸. But this is the minimum penalty, and it is inflicted only if no heavier penalty is provided.

Further, s. 132(2) provides that where the offender is a public servant the prescribed penalty for each of the following offences shall be doubled: forging licences and similar documents⁹⁹, forging official certificates¹⁰⁰, false arrest¹⁰¹, forced labour¹⁰², invasion of residence¹⁰³, tampering with correspondence¹⁰⁴, disclosure of professional confidence¹⁰⁵, forgery of a private document¹⁰⁶, and taking a copy of a government document¹⁰⁷.

In *The People v. Kwab David Annim & Tita Sikod Choh* (1979)¹⁰⁸, a count in the charge was properly drawn when it alleged as follows: “That you ... without authority took a copy of a document, to wit, a petition ... from a file in the Sub Divisional Office ... and thereby committed an offence contrary to and punishable under section 189 as read with section 132(2) of the penal

⁹⁶ Simony, *eo nomine*, is not a known offence under the Penal Code. Anciently simony was the crime of buying and selling of ecclesiastical offices. The term is derived from Simon the magician who attempted to buy from the Apostle Peter the power to make people receive the Holy Spirit by laying hands on them. See, the Holy Bible, Acts 8: 9-25.

⁹⁷ Section 89. Where responsibility is thus aggravated the maximum penalty prescribed for the offence is doubled.

⁹⁸ Section 132 (1).

⁹⁹ Section 206.

¹⁰⁰ Section 207.

¹⁰¹ Section 291 (1).

¹⁰² Section 292.

¹⁰³ Section 299.

¹⁰⁴ Section 300.

¹⁰⁵ Section 310.

¹⁰⁶ Section 315.

¹⁰⁷ Section 189.

¹⁰⁸ Unreported.

Code.”

A final point to bear in mind is that when the court convicts a public servant for any of the offences in sections 132 to 151 it has the power to impose both principal and accessory penalties¹⁰⁹. For any offence under sections 134, 134a, 135 136 and 161 the court *must* impose the forfeitures listed in s. 30, order confiscation under section 35, and make its decision available to the media¹¹⁰. In respect of other offences under this chapter, the court’s power to impose the forfeitures listed in section 30 is discretionary not mandatory¹¹¹.

§1. Use of force by public servant

It is an offence under section 132(1) for any public servant to use force against any person. The offence is punishable by imprisonment for from 6 months to 5 years, where no heavier penalty is provided elsewhere for the same conduct.

This offence must be read against the backdrop that certain categories of public servants, for example, police officers, may, under certain legally defined circumstances, legitimately use force to persons. Thus, the prohibition here must be construed as relating only to the unwarranted use of force, and the use of any force by a public servant whose job, by its nature, does not by law necessitate the use of force under any circumstance.

To use force to a person is to use force directed at the person. The common situation is the impermissible use of physical force. But there is, on principle, no good reason why the section may not be read as including the impermissible use of psychic force, coercion or compulsion.

§2. Corruption

There is not just one but many corruption offences. These corruption crimes are dispersed in the Code¹¹² and are not always drafted with clarity. The result is that there is some duplication, complicating the prosecutor’s task in selecting and properly framing an appropriate charge. There is need for consolidation here.

The various corruption crimes in the code are bribery, ‘corruption of employee’, ‘interest in gain’, ‘interest in concern’, ‘indulgence’, ‘undue demand’, ‘compulsion of public servant’, and ‘procuring influence’. These will be considered *seriatim*.

1. Bribery

Bribery is the old name for corruption. Generally it means receiving or

¹⁰⁹ Section 133.

¹¹⁰ Section 133 (2) and the proviso to subsection 1 of s. 133.

¹¹¹ Section 133 (1).

¹¹² Sections 134, 134a, 135, 136, 137, 142, 160, 161, 312.

offering any undue or improper benefit, including a sexual bribe, a promotion or an appointment bribe, by or to any person whatsoever, in a public or private office, in order to influence his behaviour in office or as a reward for having already done or foreborne to do an act of his office, thereby inclining him to act or rewarding him for having acted contrary to the known rules of honesty and integrity.

Every offence of bribery involves two parties, the giver and the receiver of the bribe. The law punishes both parties on the sufficient ground that whenever it is a crime to take, it is a crime to give, the taking and the giving being reciprocal.

The Penal Code does not use the term 'bribery'. The word is here used not as a term of art carrying special legal significance but as a general word of convenience covering the corruption offences in sections 134 and 134a. In both sections the law punishes what may be termed active and passive forms of corruption, and whether referring to the future or to the past. However, whereas s. 134 punishes the 'public servant or government employee' who *asks* for a bribe (whether he eventually got it or not) or *receives* a bribe (whether he had asked for it or not), s. 134a punishes 'whoever' *gives* the bribe (whether it was accepted or not and whether the giver acted on his own initiative or at the promptings of the other party.). Under section 134 the person who solicits or receives the bribe is the principal offender while the giver of the bribe is the accessory. By contrast, under section 134a the giver of the bribe is liable to punishment as principal and the receiver as abettor.

(a) 'Public servant or government employee' as the corruptee

Section 134 punishes the 'public servant or government employee' who, by asking for or receiving a bribe, thereby allows himself to be corrupted. His role in his own corruption may be active or passive. It is active if he takes the initiative in asking, requesting or soliciting a bribe. It is passive if the bribe was voluntarily offered or given without any prompting on his part. The offence is sufficiently wide to cover the case where the bribe is given to the official for the purpose of influencing some future conduct of his in the discharge of the functions of his office, and also the case where the bribe is given to him as a reward for some past conduct by him in carrying out his official duties.

(i) Active corruption: soliciting a bribe so as to act in a particular way

By section 134(1), "any public servant or government employee who, for himself or a third party, solicits ... any offer, promise, gift or present in order to perform, refrain from performing or postpone any act of his office" is guilty of an offence.

In order to secure a conviction under this section the prosecution must prove the following five ingredients of the offence. First, it must be shown

that the accused is a 'public servant or government employee'. The definition of 'public servant' in section 131 is widely drawn. Every government employee is *ipso facto* (by the very fact or act) a public servant. But every public servant is not a government employee. A corporate employee, for example, is a public servant within the meaning of section 131, but he is not a government employee. Since the definition of 'public servant' embraces 'government employees' it seems pleonastic to talk of 'public servant or government employee'.

Secondly, it must be shown that the public servant 'solicited' a benefit not legally due. The term 'soliciting' implies that the public servant took the initiative to ask for the bribe. He actively allowed himself to be corrupted. The crime is consummated by the mere fact of soliciting the bribe. It is unnecessary for the prosecution to prove that following upon the soliciting the bribe was actually given to and received by the accused. It is enough that there was a soliciting. If a public servant solicits a bribe then changes his mind and decides to do his duty without taking any bribe, the crime is nevertheless consummated though his change of heart might mitigate his punishment.

Thirdly, the benefit solicited must be an offer, a promise, a gift or a present. It is implicit in the wording of the crime that the offer, promise, gift or present must be something that is not legally due. It is hard to conceive of a situation where lawful charges or fees for certain services by the appropriate public servant can take the form of a mere offer or promise, or some gift or present. In the ordinary run of bribery cases the offer, promise, gift or present would be of money. However, the offer, promise or gift need not be limited to a pecuniary advantage. It may be of either a patrimonial or a non-patrimonial nature¹¹³.

The person on whose behalf the offer, promise, gift or present is solicited is immaterial. It may be for the public servant himself. Or it may be for a third party, as where the public servant acts go-between for someone else. In fact, the third party need not be a natural person, but could be an artificial person or an unincorporated association such as a club, a union and so on.

It is well to remember that the crime is committed by the mere fact that an offer, a promise, a gift or a promise was solicited. Accordingly, it is unnecessary for the prosecution to show that in consequence of the soliciting by the public servant the other party did make an offer or a promise, or gave a present or a gift.

Fourthly, the prosecution must show the purpose for which the offer,

¹¹³ A thing is of a patrimonial nature if it can be converted into or expressed in terms of money or economic value, for example, movable or immovable property, loan, sale or exchange, scholarship. A thing is of a non-patrimonial nature if it cannot be expressed in monetary terms, for example, title of honour, decoration, honorary award, a right, sexual bribe or gratification, vacation, information, promotion, or a pass mark at an examination.

promise, gift or present was solicited. In *Abraham Mbo v. The People* (1975)¹¹⁴ a policeman went into a bar, met the licensed victualer and both went into an adjoining room behind the bar. Shortly afterwards the publican called the bartender, gave her some money to count and to hand over to the policeman. She did as she was told and then left the two together. Later the policeman was arrested, prosecuted for and convicted of corruption, and he appealed.

The charge against him merely alleged that he “demanded and received the sum of 10 000 FCFA from [X] who was involved in a case of assault [he was] investigating and thereby committed an offence.” At the trial the evidence adduced by the prosecution did not indicate the purpose for which the money was given. Nor did the charge state the purpose for which the money was given and received. The Buea Court of Appeal (Tatabod, CJ, Inglis and Ngalame, JJA) did not strain itself unduly in allowing the appeal and quashing the conviction and sentence. In the Court’s unanimous judgment delivered by Tatabod, CJ their Lordships held that the defective nature of the charge in not stating the purpose for which the money was given and received and the unsatisfactory nature of the evidence in not eliciting the purpose for which the money was given were defects that went to the very root of the matter and were fatal to the respondent’s case.

Section 134(1) requires as a condition for criminal liability that the public servant must have solicited the bribe “in order to perform, refrain from performing or postpone any act of his office.” Since the purpose refers to something to be done, or something omitted to be done in the future, there is no need for the prosecution to prove that the public servant in fact performed, refrained from performing or postponed an act of his office. Proof of the purpose for which the bribe was solicited suffices, though as a matter of practice prosecutors, out of great caution and anxiety to have a ‘water tight case’, often go further to prove the thing that was done or not done by the official who solicited and received the bribe.

In *Nzèpack Joseph Marie, Amvene Denis Claude & Tutah Marcus v. The People* (1979)¹¹⁵ the 1st and 2nd appellants were gendarmes¹¹⁶ stationed in Kumba. The 3rd appellant was a dealer in cocoa. While on patrol in the vicinity of Nake village, 1st and 2nd appellants got word that one Akpan, a Nigerian and an employee of the 3rd appellant, had been dealing in produce without authorisation. They visited Akpan who told them he was a mere employee of 3rd appellant, a matter later confirmed by 3rd appellant. The gendarmes then told Akpan he had contravened the law by not being in possession of a

¹¹⁴ Criminal Appeal No. CASWP/3.c/75, unreported.

¹¹⁵ Criminal Appeal No. CASWP/10.c/79, unreported.

¹¹⁶ In France and other French-speaking countries a gendarme is a soldier employed in specific public police duties.

passport and by purchasing produce without authorisation to do so. They asked for 30 000 francs bribe and threaten to arrest Akpan if the money was not forthcoming. Akpan and 3rd appellant raised the money and handed it over to the gendarmes who then asked them to go away.

Sometimes later the matter came to light. The first two appellants were charged with corruption contrary to s. 134(1) and the 3rd appellant, together with Akpan were charged as accessories. Akpan fled the country. The three accused were tried, convicted and sentenced to 5 years' imprisonment, and they appealed. The Buea Court of Appeal (Endeley, CJ, and Inglis, J sitting with a military assessor) allowed the appeal in respect of 3rd appellant and dismissed the appeal in respect of 1st and 2nd appellant. The Court held, in its decision delivered by Inglis J, that by receiving bribe and failing to prosecute, 1st and 2nd appellants refrained from performing an act of their office and were therefore guilty of corruption; and that 3rd appellant was pressurized into handing over the bribe and so was a mere victim rather than an accessory to corruption. Their Lordships cited with approval the following dictum of Hurley Ag. CJ in *Osidola v. Police*¹¹⁷: "The fact that a man has given a bribe affords evidence upon which a trial court may, and generally ought to, find that he is an accomplice in the offence of taking the bribe; but if there are other facts and circumstances which go to show that he is in the position of a victim of the man who takes the bribe, then the court may find that he is a victim, and upon which finding he will not be regarded as an accomplice upon whose evidence it is unsafe to convict without corroboration."

Fifthly, the future conduct must be an act of the public servant's office, that is, an act that legally lies within his competence. If the act does not lie within his competence but was facilitated by his office, he will nonetheless be guilty of an offence though he will get off with a lighter punishment¹¹⁸.

There is no requirement that the public servant's intended future conduct should be something unlawful, unjust or improper. It is therefore no defence for the public servant on trial to aver that what he wanted to do in fact fell within his duties and that he accordingly did nothing unlawful or improper. The gist of the offence is that it is corruption to ask for any benefit not legally due in order to do one's appointed duty. It is always against the public interest to secure a benefit by corruption. The public servant is paid a salary to perform his appointed duties. He is therefore bound by law to discharge those selfsame duties without any view to his private emolument.

In *Isidore Boboh v. The People*¹¹⁹ the appellant, who was a senior police officer

¹¹⁷ (1958) N.R.N.L.R. 42.

¹¹⁸ Section 134 (2).

¹¹⁹ (1968) W.C.L.R. 20.

of 24 years' standing, found some drugs in execution of a search warrant. He kept the drugs and endorsed the warrant "nothing found". He then conspired with another police officer to extract 150 000 francs from the person who had been in possession of the drugs. Gordon C.J. sitting in the High Court at Buea on 18th October 1965 found him guilty of conspiracy, official corruption and demanding money with menace contrary to the Criminal Code (which was then in force at the time of the offence but which was in 1966 repealed and replaced by the Penal Code) and sentenced him to 7 years' imprisonment. The West Cameroon Court of Appeal (Cotran CJ, Kesiro J. and Dervish Ag. J.) allowed the appeal on the third count and quashed the conviction on that count. The Court also upheld the appeal on the conspiracy and corruption counts and reduced the sentence to 3 years on each count in view of the appellant's long and distinguished service in the police force. The Appellate Judges accepted the argument that given the appellant's "long service and good conduct in the police force" he had simply "succumbed to temptation".

A person found guilty of corruption under s. 134 (1) is liable to imprisonment for from 5 to 10 years and to a fine¹²⁰. Further, the court must impose on such a person the forfeitures listed in section 30, order confiscation under section 35 and direct media coverage of its decision.

(ii) Active corruption: *soliciting* a bribe for having already acted in a particular way

This form of corruption occurs when a person asks for remuneration as a reward for some past conduct by him. The situation is covered by section 134(3) which provides: "Any public servant or government employee who solicits ... any reward in money or kind for himself or for a third party as remuneration for having already performed or refrained from any [act of his office]" is guilty of an offence.

Corruption referring to the past is but a mirror image to corruption referring to the future. Accordingly, most of the requirements set out and discussed above in relation to active corruption referring to the future also apply to the form of corruption contemplated by section 134(3). The only difference between the section 134(1) corruption and the section 134 3) corruption is that in the latter case the public servant asks for a reward for having already conducted himself in a certain manner. This species of corruption is therefore committed only if the public servant had in fact conducted himself in a certain way. He must have "already performed or refrained from" any act of his office. The word 'postpone' in section 134 (1) is significantly omitted in section 134(3). Was this a deliberate omission or simply a case of an oversight in drafting? Whatever be the reason, the curious result of

¹²⁰ Of from 200 000 to 2 million francs.

that ‘omission’ is that it is an offence for a public servant to ask for a bribe in order to postpone any act of his office, but it is not a crime for a public servant to ask for a reward for having postponed an act of his office.

Under section 134(3), as under section 134(1), the mere fact of soliciting the reward suffices and it need not be shown that the reward was in fact given or received. Furthermore, it is immaterial whether the solicited reward is money or something in kind, and whether the intended beneficiary is the public servant himself or a third party. But it is incumbent upon the prosecution to show that the reward was solicited ‘as remuneration’, that is to say, as pay for services rendered.

The principal penalty provided for corruption under section 134(3) is imprisonment for from 1 to 5 years and a fine¹²¹. The punishment is thus only half as heavy as that provided for the other form of corruption. This lighter punishment is surprising and is difficult to justify either on ground of general principles of the criminal law or on criminal law policy. While the prescribed principal penalty is doubly lighter than that prescribed for the preceding form of corruption, the accessory penalty is the same in both cases. The court’s sentence must include the imposition of the forfeitures listed in section 30, an order of confiscation under section 35 and an order that its decision be reported in the media.

(iii) Passive corruption: *accepting/receiving* a bribe so as to act in a particular way. This form of corruption occurs when a public servant accepts or receives a bribe as an inducement to conduct himself in a certain way in the future. Section 134 (1) enacts: “Any public servant or government employee who for himself or for a third party, ... accepts or receives any offer, promise, gift or present in order to perform, refrain from performing or postpone any act of his office” is guilty of an offence.

Passive corruption is in principle but a mirror image of active corruption. The only difference between the two is that in passive corruption the party corrupted does not solicit the bribe but receives or accepts it nonetheless when given to him; whereas in active corruption he actually solicits the bribe. In the latter case the mere soliciting, without more, of the bribe constitutes the offence. In the former case the crime is consummated by the mere acceptance or receipt of the bribe, and so it must be proved that the public servant actually accepted or received the offer, promise, gift or present. The two words, ‘accept’ and ‘receive’ do not necessarily connote the same thing. A bribe may be accepted but as yet not received. On the other hand, when a bribe is received it is necessarily accepted, except, of course, where the receipt is for the purpose of entrapment.

A public servant commits an offence under this head not only when he

¹²¹ Of from 100,000 to 1 million francs.

accepts or receives an offer, a promise, a gift or a present for himself, but also when he does so for a third party. Where he receives for a third party his role is that of a go-between or an agent for the third party and the rationale for punishing him appears to be that he is an accomplice. Moreover, the legal maxim is *qui facit per alium facit per se*. Where the public servant makes use of an agent or go-between who accepts or receives the bribe on his behalf, the public servant is in law deemed to have constructively accepted or received the said bribe. If it were not so there would be an undesirable loophole in the law of corruption.

Passive corruption referring to the future carries the same punishment as active corruption referring to the future.

(iv) Passive corruption: *accepting* a bribe for having already acted in a particular way

By section 134(3), “any public servant or government employee who ... accepts any reward in money or kind for himself or for a third party as remuneration for having already performed or refrained from any [act of his office],” is guilty of an offence.

The requirements for passive corruption referring to the past are the same as those for active corruption referring to the past (discussed above), with the exception of one element, the requirement of ‘acceptance’. It must be shown that the public official ‘accepted’ the reward. The word ‘receives’ in section 134(1) is advisedly omitted in this subsection. It is therefore no defence for the defendant to say he did not receive the reward. It is not a requirement of the offence that the reward should have been received. All that is required is that the award should have been accepted. So long as the public official accepted the reward it is immaterial that he never took possession of it or that ownership of the thing never passed to him. The manner in which the acceptance is signified (by word, writing, conduct or sign) is of no moment. Since the offences under s. 134 are capable of being committed only by a ‘public servant’ as defined in section 131 it would seem that a porter, a doorman, a car park attendant, a barman or a waiter who receives small sums of remuneration from the public as tips would not be convicted of an offence under section 134(3).

Passive corruption referring to the past is punished in like manner as active corruption referring to the past: imprisonment for from 1 to 5 years and a fine of from 100 000 to 1 million francs, and the mandatory application of sections 30 and 35.

(b) The corrupter

The various forms of corruption envisaged under section 134a are but the mirror images of those in s. 134. The basic paradigm (active/passive

corruption referring to the past/future) is the same. The elements of the various forms of corruption have already been considered. To avoid duplication, the discussion that follows will highlight variations and will be brief.

As earlier noted s. 134a focuses on the giver of the bribe who, no doubt, is liable as principal, while the receiver of the bribe is liable as accessory. If D gives or offers a bribe to a public servant, D will be convicted as principal offender and the public servant as an accomplice.

(i) Active corruption: *giving a bribe* so as to induce a particular course of conduct

By section 134a (1), “Whoever makes promises, offers, gifts and presents ... in order to obtain either the performance, postponement or abstention from an act or one of the favours or benefits defined in the foregoing section shall be punished in like manner as under the foregoing section 134(1) whether the corruption produced its effect or not.”

Active corruption, it is well to remember, is where the corruptor takes the initiative to bribe, doing so voluntarily without any prompting or suggestion whatsoever from the corruptee.

The offender could be anybody, whether a public servant or not. A public servant who bribes another public servant so as to induce him to act in a particular way is just as guilty as the non-public servant who does the same thing.

The crime is consummated the moment the promises, offers, gifts or presents are made. The law is not concerned whether the promise, offer, gift or present produced any effect or not. There is therefore no need for the prosecution to prove that the party to whom the promises, offers, gifts or presents were made in fact performed his own part of the bargain. Since the bribe would have been given to influence a future course of conduct, the prosecution need not adduce any evidence showing that the person to whom the bribe was given did perform, postpone or abstain.

The words ‘promises’, ‘offers’, ‘gifts’, and ‘presents’ are in plural. Does it mean the crime is committed only when there is more than one promise, offer, gift or present? This is doubtful. Such a view would be indefensible as there can be no credible rationale for it. Moreover, such a narrow interpretation will create an undesirable gap in the law of corruption, providing an escape route for offenders and rendering ineffective the fight against corruption through the criminal law.

Further still, it is a canon of statutory interpretation that the singular includes the plural and the plural the singular. It cannot therefore lie in the mouth of a person charged with corruption under section 134a (1) to say, for example, that he gave ‘a gift’, not ‘gifts’. Nor can he be heard to say he gave

‘gifts’ only, and not ‘gifts *and* presents’; for the ‘and’ in the phrase ‘gifts and presents’ is not conjunctive but disjunctive. It follows that the plural form used in section 134a (1) must be taken as a mere drafting idiosyncrasy denuded of any legal significance.

Where the person who actually makes the promise, offer, gift or present is merely acting as an agent or a go-between for someone else the crime is nevertheless committed and the other person is liable as principal offender, the go-between as an accomplice. But consider the *agent provocateur*, or the undercover police officer, who gives a ‘bribe’ to a public servant in order to entrap him. Entrapment by government agents is an ancient method of criminal investigation. The undercover police officer will therefore not be guilty of an offence on the sufficient ground of lack of criminal intent. But it seems a private person who conducts himself like the undercover police officer will be committing an offence since the entrapment defence is aimed strictly at governmental misconduct.

It is submitted that section 134a (1) punishes the act of bribing anyone, whether a public servant or not. This interpretation is fortified by the words “in order to obtain either the performance, postponement or abstention from an act or one of the favours or benefits defined in the foregoing section.” The drafting of the offence is unfortunately infelicitous. However, the meaning of the words in quote appears to be this: “in order to obtain either (i) the performance or postponement of or abstention from an act, OR (ii) one of the favours or benefits defined in the foregoing section.” Section 134 to which section 134a (1) refers does not define ‘favours or benefits’, but it would seem that this is a clumsy way of referring to the phrase ‘any act of his office’ in section 134. If this construction is correct, and it is submitted that it is, then section 134a (1) contrasts ‘an act’ with ‘any act of his office’.

Where the law punishes bribery that is made so as to influence the doing of ‘*an act*’ it would seem to be the case that the person bribed would be anyone in a position or thought to be in a position to do what the corruptor expects. By contrast, where the law punishes bribery made so as to influence the doing of ‘*any act of his office*’ by a public servant it is clear that the person bribed must be a public official.

In the final analysis, under section 134a (1) neither the person bribing nor the person bribed need be a public servant. It would therefore seem incongruous that section 134a should have been classified under chapter III as one of the offences by public servants as such.

The act that the corruptee is induced through bribery to perform, refrain from performing, or postpone may or may not be one within the normal exercise of the functions of his office. It matters not. Consequently, it is not necessary for the prosecution to prove that the corruptee was swayed or deflected from the proper discharge of his duty. A bribe to perform some duty

which falls within one's appointed duties is as much corruption as a bribery to do something improper in the course of discharging one's duties or unconnected with the officer's duties.

(ii) Active corruption: *giving a bribe* as pay for a particular past conduct

This form of corruption is covered by section 134a (2) which provides as follows: "Whoever makes gifts and presents ... for the remuneration of an act which has or has not been performed shall be punished in like manner as under the foregoing section 134 (2)."

Here, it must be shown that the gift or present was given after the act had already been done or the omission made and, further, that the gift or present was given as pay for the past conduct. *Quaere*, whether a person is guilty of the offence if he gives a small sum of money as a tip to a porter, barman (bartender), waiter, hostess, house servant or a group of entertainers such as a theatrical troupe, a musical or dance ensemble. It is submitted that it is not an offence to do so in view of the fact that it is a common practice the world over, suggesting that it is not conduct *contra bonos mores*.

(iii) Passive corruption: *yielding* to be bribed to perform some particular act

"Whoever ... yields to requests liable to result in corruption in order to obtain either the performance, postponement or abstention from an act or one of the favours or benefits defined in the foregoing section shall be punished in like manner as under the foregoing section 134 (1) whether the corruption produced its effect or not."

This formulation agrees substantially with the formulation of the corresponding requirement for active corruption (by the corruptor) referring to the future, and discussed above. The only difference is that here the corruptor plays a passive role. This is indicated by the words 'yields to requests'. The corruptor does not take the initiative to offer or give a bribe. He gives the bribe, but does so reluctantly. The idea of a bribe and the request for it proceed from the corruptee himself, the corruptor merely yielding or succumbing to the request.

This offence smacks of extortion and is punishable as such in many jurisdictions. The attitude of the law is that the person from whom a bribe is requested ought to resist such an improper request. Although the word 'requests' is in plural, there need not in fact be several requests. The crime is consummated even when the corruptor yields to just a single request.

It must however be shown that the request to which the accused yielded was a request 'liable to result in corruption'. That is to say, it was an improper request, a request that was not legally permissible to have made. If the accused yielded to a lawful request, such as a request to pay the legally prescribed fees for, say, a licence, this cannot amount to corruption.

(iv) Passive corruption: *yielding* to bribe as pay for having already performed a particular act

Section 134a (2) provides that this form of corruption is committed by “whoever ... yields to requests for the remuneration of an act which has ... been performed.”

The punishment is the same as that prescribed for corruption under s. 134 (2). The words ‘liable to result in corruption’ appear in passive corruption referring to the future. In the formulation of the offence under section 134a (2), however, those words have been omitted and the words ‘for the remuneration of’ brought in. The legal effect is the same. The reasoning of the law is this. A person receives a salary for the functions he is employed to perform. If therefore he requests from any member of the public who comes to him to be served remuneration for discharging any function of his office, such a request must, *ex hypothesis*, be improper and should be resisted by the person to whom the request is made. If he is weak and yields to such an improper request then he is guilty of an offence.

The term ‘yield’ connotes not only that the defendant acted reluctantly but also that he actually gave the remuneration. The prosecution must therefore show that there was delivery, actual or constructive, of something as “remuneration for an act which has ... been performed.”

(c) Prior consent to prosecution

No prosecution in respect of an offence under sections 134 and 134a can be instituted except by or with the consent of the local Chief Law Officer. It is so provided in section 46 (1) of Schedule III (B) to the Penal Code. In *David King Molonge v. The Commissioner of Police*¹²² Endeley J. in the High Court of West Cameroon held that the infringement of the provisions of section 46(1), in not having the consent of the Chief Law Officer to a prosecution under section 134, is fatal to the prosecution because it renders the proceedings based on such a prosecution bad *ab initio* (from the start). The learned Judge observed:

“[T]he commencement of a prosecution under section 134 without the prior consent of the Procureur-General will be an obvious infringement of section 46 (1) of Schedule III to the Penal Code Book 2, a rule enacted by Parliament as one necessary for the good administration of justice. In Devlin J’s, ‘Criminal Prosecution in England’ page 37 cited at page 112 of the February issue of the 1961 Criminal Law Review, the following passage appears: “Many cases could be cited of a conviction that has been quashed in the case of a man who is obviously guilty simply because a rule that is necessary for the good administration of justice has been infringed.” In *R. v. McKenna* (1960) 1 Q.B. 411, the Court of Criminal

¹²² (1968) W.C.L.R. 21.

Appeals in England quashed appeals although there was cogent evidence against all three appellants, and in doing so observed that “plain though many juries may have thought this case, the principle at stake is more important than the case itself”. In the appeal *J.E. Sona v. Commissioner of Police*, reported in (1962-1964) W.C.L.R. 54 the High Court quashed the appellant’s conviction and sentence on the ground that the decision to lift his immunity as a Member of Parliament was prepared and served on the appellant long after criminal proceedings against him had been commenced, a procedure which infringed Ordinances 62-OF-15 and 62-OF-22 of March 1962. These authorities lend strong support to the view I hold that, this infringement of the provisions of section 46 (1) of Schedule III to the Penal Code Book 2 is fatal to a prosecution for any of the offences therein listed, because it renders the proceedings based on such a prosecution bad ab initio. Because I hold that the trial procedures which resulted in the conviction of the appellant were bad ab initio, this appeal is allowed and the conviction and sentence against him quashed”¹²³.

The power of the Chief Law Officer to give (or withhold) consent for prosecution in respect of certain named offences is a personal, non-delegable power. Section 46 (1) provides that no prosecution may be instituted “except *by or with* the consent of the [Chief Law Officer]”. The words in italics mean the power can be exercised in two ways. The Chief Law Officer can appear in court personally and orally state that he consents to the prosecution of the particular offence. Alternatively, (and this seems to be the more usual situation), he can exercise his power in writing by entering an instrument signed under his hand stating that he consents to the prosecution of the offence in question, which instrument is then produced in court by any of the law officers in his department conducting the prosecution. The instrument could simply be lodged with the registrar of the court, so as to be available if called for at the trial. It would seem, however, from the Nigerian case of *R. v. Ibrahim* (1953)¹²⁴ that it is not necessary to prove at the trial the document purporting to bear the fiat or consent of the Chief Law Officer unless objection is taken. It seems to be the case also that such a document will be regarded as *prima facie* (at first sight) evidence without proof of signature. The assumption seems to be that in exercising this power the local chief law officer has regard to public interest, the interests of justice and the need to prevent abuse of the legal process.

2. Corruption of employee

Definition. “Any employee in receipt of any form of emolument who without

¹²³ By contrast, in the English case of *Price v. Humphries* (1958) 2 Q.B. 353, the maxim *omnia praesumuntur rite esse acta* (all things are presumed to have been correctly done) was applied to uphold a conviction where the consent of the Attorney General, though required by law, was not proved to have been given.

¹²⁴ 20 N.L.R. 137.

the permission of his employer receives any gift or accepts any promise for doing or omitting any act of his employment” commits an offence under section 312.

Interest protected. This offence appears in the Penal Code under the classification of offences against private interest. This would suggest that the offence exists for the protection of individual persons, not for the protection of the community as such. More specifically, the conduct is made an offence for the protection of the confidence of individuals. The law frowns on the use of one’s employment or office as a lever to get benefits from members of the public who come to one’s office to be legitimately served.

Ingredients of the offence. The focus of this offence is the receiver of the bribe. But since the giver of the bribe also commits an offence in the same way as the receiver the law also punishes him, albeit as an accessory. The following are the elements of the offence. The accused must be an employee. He must be in receipt of some form of emolument. He must have received some gift or accepted some promise. He must have received the gift or promise without the permission of his employer. The gift must have been received or the promise accepted by the employee for doing or omitting any act of his employment.

(i) Any employee. The Code offers no definition of ‘employee’ for the purpose of the criminal law. Generally, an employee is any worker engaged under a contract of service or employment. The term is wide enough to cover both public and private sector employees. However, public administration law sometimes distinguishes between the ‘civil servant’ who is, generally speaking, a permanent or established worker, and the ‘contract worker’ who is an employee hired for a fixed or indeterminate term by the state, public corporation, private company, an unincorporated body or private individuals. As far as the offence under s. 312 goes, it would be logically consistent to construe ‘employee’ as referring to any worker other than a public servant or government employee. This is so because the offence of ‘corruption of employee’ is classified as an offence against private interest. Moreover, there is another corruption offence specifically targeting ‘public servants and government employees.’

(ii) Any form of emoluments. It must be shown that the employee is paid a salary. The salary need not have been actually paid at the time of receipt of the bribe. It is sufficient to show that the employee is entitled to or is due a salary. It is therefore not a credible defence for the defendant to argue that he received the gift well before his salary was paid. The emolument paid to the employee may be in ‘any form’, that is, in money or in kind.

(iii) Any gift or promise. The prosecution must prove that a gift was in fact received or a promise accepted. Where it is alleged that a gift was received it need not be shown that the accused himself actually took delivery. In criminal law the word 'receive' (as in 'receiving' stolen goods) is construed wide enough to include constructive modes of delivery. Thus the accused would be deemed to have 'received' the gift if it was delivered to his named agent or go-between. Where it is alleged that the accused accepted a promise, it is sufficient to show that the promise was indeed made (whether orally, by sign, by conduct, or in writing) and was accepted (whether by word, sign, conduct or writing) by the accused or his authorized agent. There is no need to go further to show that the promise materialized; for the offence is committed by the mere acceptance of the promise and whether or not it materialized is of no moment in the eyes of the law.

(iv) Without the employer's permission. The accused is guilty only if he received the gift or accepted the promise without the prior authorisation of his employer. If he had the permission of his employer to receive the gift or to accept the promise, such authorisation would be a complete defence to a charge under this section. The requisite permission must however come from the employer himself and not from someone else. The onus is on the accused to make good his defence. For the defence to succeed the permission must have preceded the impugned conduct. It is within the letter and spirit of the section receipt of any gift or acceptance of any promise must be with the prior permission of the employer. However, provided permission is given before the receipt or acceptance, it matters not whether it was written or oral, express or implied (as from the course of dealing such as an established practice in the particular business for employees to receive gifts from customers or clients), for the particular occasion only or for all occasions.

(v) Any act of his employment. All that needs to be shown here is that a gift was received or a promise accepted by the employee in order to do or not to do an act of his employment. The section does not require that there should have been performance or omission. Nor does it require that the employee should have been swayed or deflected from the honest and impartial discharge of his employment. Nor again is it material that the employee, though he received the gift or accepted the promise, had no intention of doing the act promised even though he held himself out as intending to do so. The offence is committed even if the gift was received or the promise was accepted for doing some act, the performance of which he was charged under his contract of employment.

Punishment. The prescribed penalty for this offence is imprisonment for from 1 to 3 years and/or a fine¹²⁵. The punishment is comparatively benign when it is remembered that for a similar conduct the public servant or government employee is punished far more severely. This would suggest that the law demands a higher degree of probity and integrity from public servants than from private sector employees. There does not appear to be any compelling justification for this double standard.

Prosecution is subject to prior consent. No prosecution in respect of this offence can be instituted except by or with the consent of the Chief Law Officer¹²⁶. The reason for this requirement in regard to this offence is not clear.

3. Interest in grant

Definition. This crime is couched in these terms: “Any public servant or government employee who takes or accepts any interest, direct or indirect:

(a) in any grant, contract or selection of tenders subject to his opinion or which he supervised, controlled, administered or drew up;

(b) in any private concern, co-operative, semi-public corporation or corporation in which the public has shares, in any authority or concession subject to his supervision or control;

(c) in contracts or agreements signed on behalf of the state or a local authority with a natural person or body corporate;

(d) in any business for which it is his duty to authorize payment or [to liquidate],” shall be guilty of an offence under section 135(1).

Mischief. The mischief aimed at by section 135 is the taking or acceptance by a public official of any private interest, direct or indirect, in any contract or business in which he has acted or is acting in some official capacity. The unfortunate tortuousness of the definition may be ascribed to the draftsman’s ambition to cast the offence in the most comprehensive language.

Interest protected. The interest protected is that of probity in public officials in the discharge of their duties. For when a public official acquires a private interest in any business or contract in which he is acting or has acted in some official capacity, a conflict of interest situation arises. Such a situation conduces to corruption. Moreover, it amounts to an unhealthy meddling in those matters.

‘Takes or accepts’. As used here, these words mean ‘acquire as one’s own’.

¹²⁵ Of from 50 000 to 500 000 francs.

¹²⁶ Section 46 (1), Schedule III B to the Penal Code.

‘Takes’ suggests that the public official gained or got the interest by his own exertions or qualities, whereas ‘accepts’ connotes that he received or came into possession of the interest (e.g., as where he is offered the interest as a gift, or as consideration or *quid pro quo* for something). The interest may be small or big, direct or indirect (as where an interest is acquired through a spouse or relative or a company acting as a mere front or cover). The prohibition against the acquisition, by a public servant or government employee, of any private interest in any business or contract in which he is acting or has acted in some official capacity does not end when the official is no longer in employment as public servant or government employee but continues for five years after cessation of duties¹²⁷.

Punishment. Upon conviction for this offence the court has power to sentence to a term of imprisonment for from 1 to 5 years and to a fine¹²⁸. In addition, the court must impose the forfeitures listed in section 30, order confiscation under section 35 and the media publication of its decision.

4. Interest in concern

Definition. By section 136 (1), “Any public servant whose duties include the supervision of any concern, undertaking or concession, or the expression of an opinion on its operations, and who in any manner assists or shares in its financing or operation, shall be punished ...”

The offender. Only a public servant is liable to commit this offence. In this and subsequent sections in this chapter of the Code, the draftsman no longer speaks of ‘public servant and government employee’ but only of ‘public servant’. This is intriguing. But, as it was pointed out in the discussion of section 134 the words ‘or government employee’ coming after the widely defined term ‘public servant’ are otiose and should have been left out, and indeed may be safely ignored.

It must be shown not only that the accused is a public servant within the meaning of section 133 but also that he was a public servant whose official duties included either the supervision of a ‘business’ or the expression of an opinion on its operation. The category of public servants most likely to be caught by this provision are officials of a corporation or semi-public corporation as well as officials of the state (or of any other body corporate governed by public law) whose duties include oversight of public corporations and responsibility in connection with certain activities carried out by the state such as building a road, a school, a hospital or other public facility.

¹²⁷ Section 135 (2).

¹²⁸ Of from 200,000 to 2 million francs.

The gist of the offence is the assisting or sharing in any manner in the financing or in the operation of the 'business'. It is therefore an offence for a public servant whose duties include supervising a 'business' or expressing an opinion on its operations, to finance or help in financing in any way whatever the 'business' or to run or help in running the business. Such conduct gives rise to conflict of interests. The public servant's stake in the business may hamper his supervisory duty, influence his opinion and incline him to act contrary to the dictates of honesty, impartiality and probity. The rationale for this offence is that by trying to serve two masters at the same time the accused acts unconscionably and tries to make an improper gain for himself.

The prohibition under section 136 remains valid for a period of five years from the time the public servant's duties no longer included supervision of the 'business' or expressing an opinion on its operations¹²⁹. The reason for the five-year period appears to be that the accused would have acquired some privileged information by virtue of his office and cannot be allowed to use it to make a profit for himself¹³⁰.

Defence. It is a special defence under this section that the money the defendant has in the business represents shares transmitted to him by way of inheritance¹³¹.

Punishment. The prescribed punishment for an offence under either subsection (1) or subsection (2) of section 136 is imprisonment for from 6 months to 2 years and a fine¹³². In addition the court must impose the forfeitures listed in s. 30, order media publication of its decision and order confiscation under section 35.

5. Indulgence

Section 137 creates two distinct offences. It punishes the public servant who (i) grants exemption from any fee, due, duty, tax or contribution; or (ii) delivers any produce at a lesser price than that prescribed. A count of an indictment which merely charges the accused with 'indulgence contrary to section 137' will be bad for duplicity. It is trite law that the charge must not be vague. The prosecution must be clear: is the alleged offence that of granting exemption from any fee etc., or is it that of delivering produce (i.e. commodity) at a lesser price? If the accused committed both then each must be charged separately.

The exemption from the specific revenue that is due must have been actually granted not merely promised. However, the crime is consummated

¹²⁹ Section 136 (2).

¹³⁰ Cf. the prohibition in company law against insider dealing.

¹³¹ Section 136 (2).

¹³² Of from 200 000 to 2 million francs.

whether the exemption is total or partial. Where the charge alleges that the produce was delivered at a lesser price than that prescribed, it must be shown that there was a delivery. But it need not be actual delivery. Proof of any form of constructive delivery suffices. It must also be shown that the price was less than that prescribed. No offence is committed under this section if the produce was delivered at a price higher than that prescribed. Finally, it must be proved that the produce was that of a government department, of a cooperative, or of any authority or corporation either public or subject to the administrative control of the state, or in which the state holds directly or indirectly the majority of the shares.

Interest protected. The interest protected by punishing the acts in section 137 is government revenue. The sort of conduct which section 137 frowns on has a negative impact on state finances by reducing government revenue. The conduct is never gratuitous. There is always a *quid pro quo* for granting an exemption or for delivering produce at a less than the prescribed price. The conduct therefore represents a vicious form of corruption – hitting at government revenue and at the same time unjustly enriching oneself.

Punishment. What has just been said explains the severity of the prescribed punishment, which includes imprisonment for 2 to 10 years and a fine¹³³. Imposition of the forfeitures listed in s. 30 is at the court's discretion.

6. Undue demand

Section 142 creates and punishes the crime of 'undue demand'. The offence is couched in these terms: "Any public servant, notary, public auctioneer, bailiff or process server or representative of any such, who demands any fee, due, duty or tax which is not due, or any material benefit otherwise than on payment of the proper price, shall be punished with imprisonment for from 2 to 10 years and with fine¹³⁴."

Meaning. This offence is derived from the common law '*concuissio*'. It signifies the unlawful demand by any public or ministerial officer, by colour of his office, of any money (fee, due, duty or tax) or any material benefit otherwise than on payment of the proper price. In other words the person uses the power of his office as pressure either to acquire money which the giver would not have given if an undue demand had not been made from him or to acquire a material benefit otherwise than on payment of the proper price.

There is no requirement that the wrongdoer should have used threats, force or intimidation in demanding the money or the material advantage. In

¹³³ Of from 20 000 to 2 million francs.

¹³⁴ Of from 20 000 to 2 million francs.

this the crime of undue demand under the Code differs from the crime of extortion in other jurisdictions. It also differs from the offence of 'extortion of disposition or signature' under section 308 of the Code. Again it also differs from the crime of 'blackmail' under section 303 of the Code.

Perpetrators. Undue demand is an offence the commission of which may only be by certain persons whose professional duties involve interaction with the general public: public servants (as defined in section 131), notaries public, public auctioneers, bailiffs, process-servers, and agents of any of these.

The demand. The offence is completed when the demand is made. It is unnecessary to show that the money or material benefit was indeed obtained. If the accused obtained the money or material benefit not in consequence of a demand but because it was spontaneously given to him for the more diligent or expeditious performance of his duty, he cannot be properly convicted of undue demand. However, if there was a demand, it is immaterial how it was made: verbally, in writing, by conduct, or through a third party.

What the law punishes is not a demand *per se*, but the demand of money not due or the demand of any material benefit otherwise than on payment of the proper price.

Demand of money not due. A demand of a fee, due, duty or tax is undue if it was not due at all or if it was not yet due or if it was more than the amount due. The law will not suffer a public or ministerial officer to demand money for doing anything relating to his office other than what he is entitled to under applicable legislation. Where money is lawfully due it may be legally demanded and insisted upon. Nevertheless, the crime will be committed if, although the money is legally due, the amount demanded exceeds what is legally due, or the correct amount is demanded before it falls due. Thus, an officer who demands more money than the amount stipulated by the relevant legislation can properly be convicted of undue demand.

Similarly, it is an undue demand for a process-server to refuse to execute process until his fees have been paid or for a physician to refuse to carry out a post mortem examination until his fees have been paid. By demanding the fees before, instead of after, completion of the service requested of him, the process-server or the physician, as the case may be, is guilty of making an undue demand. The law cannot sanction payments induced by what in effect amounts to threats. A defence of claim of right is therefore unlikely to succeed if the demand was in excess of what was due or if it was made before it was due.

Demand of material benefits. It is important to note that section 142 does

not prohibit the demand of a material benefit. What is punished is the demand of a material benefit ‘otherwise than on payment of the proper price’. Thus, provided the proper price is paid for it, it is not an offence for a public or ministerial officer to demand a material benefit. The price must be ‘proper’, that is, adequate or fair; if not, the officer will be guilty of an offence. Whether a price is proper or not is a question of fact to be determined by the court in each particular case.

One question which the courts have not yet pronounced themselves upon is whether the material benefit should be restricted to something of a patrimonial nature (that is, something which can be converted into or expressed ultimately in terms of money or economic value) or it includes things of an extra-patrimonial nature (that is, things that cannot be expressed in monetary terms). For example, a public servant who demands an individual to provide him with free accommodation, transport or meals commits an offence under section 142. But supposing he demands sexual gratification, a decoration, a title of honour or an honorary award? At least as far as sexual gratification goes, it is doubtful that he can be convicted, as it is a physical rather than a material benefit. It is probably the case that ‘material benefit’ suggests something of a patrimonial rather than of an extra-patrimonial nature.

Punishment. In addition to the prescribed fine and term of imprisonment, the court may also impose the forfeitures listed in section 30. The punishment is thus heavier than that prescribed for blackmail under section 303(1). The policy of the law appears to be that when a public servant takes advantage of his position to make an undue demand such conduct is a more reprehensible state of affairs than a similar conduct by a private citizen.

7. Compulsion of public servant

By section 160, “whoever by interference or threat procures a public servant improperly to perform or to refrain from any act of his office, shall be punished with imprisonment for from two to ten years and with fine¹³⁵.”

This section punishes anyone who by ‘interference’ (that is, force) or threat procures a public servant to do *improperly* or to refrain from doing an act of his office. This is a form of corruption that smacks of extortion practiced on a public servant. The situation contemplated by section 160 is different from that which section 142 takes care of. The case envisaged by section 142 is that where a public servant uses his public office as a lever to extract money or some material benefit from members of the public who come to his office to be legitimately served. Under that section the public servant is the ‘rogue’ and the member of the public who deals with him is the ‘victim’. But under section 160 the roles are reversed. The public servant is the ‘victim’ and the other

¹³⁵ From 20 000 to 1 million francs

person is the 'rogue' using violence or threat to achieve his aim.

The various ways in which the section 160 offence may be committed are limited to the use of 'interference' or 'threat' capable of inducing fear. So long as it was capable of inducing fear it is of no consequence that the interference or threat was of low intensity or that it did not in fact induce the intended fear. A person commits the offence when he assaults or threatens (coerces) a public servant to do improperly or to omit to do something in the discharge of the duties of his office. However, it must be shown that as a result of the assault or threat the public servant acted improperly or refrained from acting in relation to the functions of his office. If, in spite of the assault or threat, the public servant remained unmoved, (that is, he did not improperly perform or did not refrain from an act of his office) only an attempt would lie. If the act that the public servant improperly performed or from which he refrained had nothing to do with the functions of his office, there is no offence under the section. The essence of section 160 is that the interference or threat must have been made by the defendant to sway or deflect the public servant from an act of his office.

It is not necessary that the interference or threat be directed at the public servant himself, although this would usually be the case. Violence or threat against a family member of the public servant (child, spouse, relative) or a very close friend would suffice. Moreover, in the case of threats it need not be shown that such threats were of bodily harm. A threat of say defamation, dismissal, demotion, arrest, prosecution, salary delay or cut, seizure of property etc. would suffice. Further, the threat may be explicit or implied, oral or written, or by conduct.

8. Procuring influence

Section 161 deals with what it calls 'procuring influence', that is to say, traffic in influence or peddling influence. In the classic corruption offence, the corruptee is either bribed or constrained to do or not to do an act of his office. Under section 161 the situation contemplated is that in which the corruptee is bribed or is induced to take undue advantage of the real or supposed influence that his status or office confers upon him, to procure some advantage from a public authority. There are two 'rogues' here, the corruptee and the corruptor, the latter being the principal offender and the former the accessory. The 'victim' is the targeted public authority, not the giver of the bribe. Procuring influence is conduct that injures the common weal and for this reason it is made an offence for the protection of the public welfare, not for the protection of potential bribe givers.

Section 161 envisages two situations, each of which is dealt with in a separate subsection. Subsection (1) contemplates the situation where a person corrupts another having real or supposed influence, to procure an advantage

from a public authority. The corruptor and the corruptee must be *persons*, that is to say, natural as distinct from artificial persons, for corporate criminal liability is exceptional in criminal law. The corruptor may be any person. But the corruptee must be a person having or deemed to have real influence to procure an advantage from a public authority.

The method used to effect the corruption must be any of those listed in the subsection, namely, assault, threat, gift or promise. Mere cajolery, entreaty, supplication or importunity will not do. Since the object of 'traffic in influence' is to procure some advantage from a public authority, no crime is committed under section 161 (1) if the advantage is procured from a private individual or body. The phrase 'any advantage' signifies that the offence is committed irrespective of the nature or type of advantage involved: employment, public contract, promotion, an award, a decoration, any favour, etc. Whether the advantage is for the benefit of the corruptor or a third party is irrelevant. Moreover, it is unnecessary to show that the advantage sought was actually procured. The crime is complete when a person is threatened, assaulted, given a gift or made a promise to incline him to procure an advantage from a public authority.

Section 161(2) contemplates the situation where a public servant, taking undue advantage of the real or supposed influence that his status or office confers upon him, receives a bribe in order to procure any advantage whatever from any public authority. The law is indifferent whether the bribe is for a third party or for the public servant himself and whether it was solicited or was spontaneously offered. Equally immaterial is the form of the bribe: a gift, an offer, or a promise. A public authority is any government office or service, including anybody placed under the control of a public authority.

The punishment under section 161 is the same as that provided for under section 160. When passing sentence the court must additionally impose the forfeitures listed in s.30 as well as the confiscations in section 35.

§3. Abuse of office

Sections 140-144 deal with various offences against private interest, likely to be committed by a public servant. The specific kinds of conduct dealt with are those in which the public officer, in abuse of the authority of his office, acts arbitrarily and to the prejudice of the rights of another: infringement of any private right or interest, obstructing the exercise or enjoyment by a citizen of his civic rights, undue demand, deciding between parties from favour or ill-will, forgery of an official act.

1. Oppression

Any public servant who takes advantage of his position to infringe any private right or interest is guilty of what s.140 terms 'oppression'. Whether or not the

public servant took advantage of his position, and whether a ‘right or interest’ is of a ‘private’ nature are both questions of fact for the notional jury.

No prosecution for this offence may be instituted except by or with the consent of the head of the local prosecuting authority¹³⁶. The offence is punishable with imprisonment for from three months to one year, and/or with fine¹³⁷. The court may, in addition, impose any of the forfeitures listed in s.30. Where the offence is committed *with intent* to procure for the offender or for another any gain of any kind, that fact is an aggravating circumstance and the punishment becomes imprisonment for from three months to three years, and a fine¹³⁸.

2. Obstructing the exercise of civic rights

Section 141 punishes with imprisonment for from one to five years, any public servant who obstructs the exercise or enjoyment by a citizen of any of the following rights: electoral rights; the right to be in any public service, employment, or office¹³⁹; the right to be a juror, assessor, expert referee, or sworn expert¹⁴⁰; the right to wear any decoration¹⁴¹; and the right to serve in the armed forces.

The obstruction must, of course, be unlawful. A judge, for example, who lawfully imposes any of the forfeitures described in section 30 of the Penal Code, is not guilty of ‘obstructing’ a citizen in the enjoyment of his civic rights.

3. Favour

By section 143(1), any public servant who decides between parties from favour or ill-will incurs the penalty of imprisonment for from one to five years. The penalty is doubled where the public servant is a judicial or legal officer, or head of a sub-national entity¹⁴².

Unlike in corruption cases, securing a conviction under this offence does not require proof that the accused acted corruptly. It is not necessary to show that the accused demanded, received or was offered a bribe to favour one party. If the case involves a bribe the prosecution may chose to prefer a charge under the appropriate bribery offence.

While it is unnecessary to prove corruption on a charge under section 143(1), it must however be proved that there was a decision, judicial or administrative; that the decision was tainted with bias against or in favour of one of the parties; and that the accused was actuated by favouritism or ill-will.

¹³⁶ Schedule III (B), s.46 (1).

¹³⁷ Of from 5 000 to 50 000 francs.

¹³⁸ Of from 50 000 to 1 million francs. Section 140 (2).

¹³⁹ Section 30 (1).

¹⁴⁰ Section 30 (2).

¹⁴¹ Section 30 (4).

¹⁴² Section 143 (2).

It is noteworthy that judicial officers cannot be tried for mere error of judgment. They in fact enjoy judicial immunity in respect of whatever they say on the throne of judgment. However, the corruption, oppression and tyrannical partiality of judges, magistrates and arbitrators in the administration of justice and under colour of their offices invites visitation of the criminal law. For, it is of infinite importance to the public that the acts of judicial officers should not only be substantially good, but also that they should be decorous. Since judicial and administrative partiality affect justice in some way, the offence under s.143 is considered much more seriously (imprisonment of from 2 to 10 years) when committed by a judicial officer, a legal officer, or the head of an administrative unit.

4. Forgery of official act

“Any public servant, notary, public auctioneer, bailiff or process-server who falsely makes or alters, whether in its substance or in the dates or signatures of parties or witnesses, any deed, entry or other writing which it is his duty to draw up, record, certify or serve, shall be punished with imprisonment for from ten to twenty years”¹⁴³.

The penalty for this offence is quite grim on account, it would seem, of the fiduciary nature of their office and the abuse of confidence that their conduct amounts to. It is substantially the same as that provided for the forgery offences under sections 201 *et seq.* However, whereas the latter offences are crimes against state guarantees, the former offence is a crime against private interest. Furthermore, the forgery offences under sections 201 *et seq.* deal with the falsification of acts or documents prepared by another, generally the state, and so is in fact a case of physical forgery.

Under section 144 the forgery relates to “any deed, entry or other writing” which it is the duty of the accused “to draw up, record, certify or serve.” Forgery under this section may take the form of a physical alteration or falsification of the document or other writing, as where figures, letters or words are changed, added, inserted, erased or obliterated. The document then contains a falsity.

Forgery under the section may also take the form ‘intellectual falsification’ or what is sometimes referred to as ‘automendacity’. This form of fraud is more insidious as it leaves no apparent material trace and is more difficult to prove. There is no falsification on the face of the document but what is therein stated is false (a falsification of the thought of the parties and not merely that it tells a lie). The document tells a lie about itself. It is a false document as it purports to be that which it is not.

¹⁴³ Section 144.

§4. Culpable abstention

This paragraph deals with nine culpable-abstention offences. They are all cases of non-feasance or ‘not-doing’. They are all cases in which the public servant fails to act consistently with the legal obligation imposed on him to act in a certain way. Criminal responsibility for omission is exceptional. The offences under this head are therefore examples of some of the few instances in which the criminal law punishes mere ‘omission’. The court’s sentencing powers in respect of the offences here include the power to impose, at its discretion, any of the forfeitures listed in section 30.

1. Failure to report deficiency

It is an offence punishable with imprisonment for from one to five years, for any public servant having knowledge of any cash or book deficiency in the account of a public official under his orders or supervision, not to report the deficiency to the legal authorities or to his immediate superior¹⁴⁴. This offence is committed only when the public servant had *knowledge* of the deficiency and did not report it. Failure to report a mere suspicion of deficiency does not fall within the terms of the provision.

2. Negligent custody

The crime under section 139 is one of the few cases in the Penal Code in which criminal responsibility is imposed for negligence. The section deals with certain ‘permitting’ offences for which a custodian would be held criminally liable on the ground that he ‘negligently permitted’ them. The section punishes the custodian who by ‘negligence permits’ something to be done. The conjunction of the words in quotation marks suggests that the offences under this section cannot be committed by giving words of authorization. They can only be committed when the custodian, being the one in control of the situation, fails to prevent the impugned conduct.

Section 139(1) punishes the custodian who fails to prevent the destruction, the defacement or the abstraction of any public or protected property, namely, any monument or statue or other property dedicated to public use or adornment and erected by public authority or by leave of the said authority; and protected immovable or movable object or natural feature or site. The prescribed penalty is imprisonment for from one month to one year and a fine¹⁴⁵.

The same penalty is incurred by the custodian who fails to prevent the abstraction, the removal or the destruction of any public record, that is, any document in the custody of any public authority¹⁴⁶.

¹⁴⁴ Section 138.

¹⁴⁵ From 10.000 to 50.000 francs.

¹⁴⁶ Section 139 (2).

Again, the custodian who, by negligence, permits any seal lawfully affixed to be broken is liable to imprisonment for from 6 days to 6 months. Further, the custodian who negligently permits a person in lawful custody to escape or to be rescued makes himself liable to imprisonment for from 2 months to 2 years¹⁴⁷.

3. Failure to suppress riot

By section 145, “Any public servant who, having the power, the duty and the means so to do, refrains from dispersing a riot ... shall be punished with imprisonment for from three months to two years.”

A riot is defined in section 232(1) as “an assembly on the public highway of five or more persons in manner liable to disturb the public peace.”

To secure a conviction for ‘failure to suppress riot’ it is not sufficient merely to show that the accused is a public servant and that he refrained from dispersing a riot. The prosecution must also prove that the accused had “the power, the duty and the means so to do.” It must be shown that the accused had all those three things (power, duty and means) and not just one or two of them.

It follows from the definition of ‘riot’ in section 232(1) that an assembly of more than five persons on a private thoroughfare or premises is not a riot even if it is in manner liable to disturb the public peace. Likewise, an assembly of two, three or four persons on the public highway even in manner liable to disturb the public peace is not a riot within the meaning of the criminal law.

4. Failure to protect private rights

Any public servant who having the power, the duty and the means so to do, refrains from preventing the use of force against any person, or his deprivation of liberty or any obstruction to the exercise of his civic rights, is guilty of an offence and liable to punishment as an accessory¹⁴⁸.

It is not clear why only the accused under section 146 should be punished as an accessory and not the accused under section 145 as well. In both cases the accused refrains from interposing where a crime is being committed. Be that as it may, this is probably not a significant detail since in terms of section 98 (1) an accessory is punishable in like manner as a sole or principal offender.

5. Denial of justice

Denial of justice is an offence that may be committed only by a person exercising judicial functions. The offence is committed when such a person “declines, after having been duly moved in that behalf, to issue a decision”¹⁴⁹.

¹⁴⁷ Section 139 (3).

¹⁴⁸ Section 146.

¹⁴⁹ Section 147.

The offence carries a term of imprisonment of from three months to two years.

A judge is criminally liable under this section only if it is shown that he had been duly moved. The normal reservation of judgment to be rendered at a later fixed date does not amount to denial of justice. But an adjournment *sine die* arguably could.

6. Refusal of service

Any public servant, notary, public auctioneer, bailiff, or process-server who, having been lawfully required, refrains from performance of any duty of his office, is guilty of an offence punishable with imprisonment for from three months to two years¹⁵⁰. Public servants whose services are often lawfully required include the police, doctors, municipal officials and civil servants.

7. Neglect of preliminaries to marriage

Section 149 punishes the registrar of marriages who celebrates a marriage without checking that certain important prior formalities have been satisfied.

“Section 149(1) Any registrar of ... marriages ... who registers a marriage celebrated by himself: (a) without checking that all consents required for its validity have been given; or (b) before the expiry of such time as may be prescribed in case the wife has already been married, shall be punished with imprisonment for from three months to one year and with a fine¹⁵¹.”

Such an irregularity may have consequences in civil law. Whatever those consequence might be they are however immaterial as far as the application of this provision is concerned¹⁵².

8. Entry of births, marriages and deaths elsewhere than in the prescribed register

It is an offence punishable with imprisonment for from one to three months and with fine¹⁵³, for any registrar of births, marriages and deaths to make any entry elsewhere than in the registers prescribed in that behalf.

It is also an offence carrying the same penalty, for any such registrar to fail to enter any such birth, marriage or death.

9. Persistent neglect

Section 151(1) punishes two types of conduct: (i) procrastination, delay or confusion caused by a public servant's persistent obstruction or neglect, and (ii) a public servant persistently refraining from performing any duty of his

¹⁵⁰ Section 148.

¹⁵¹ Of from 5.000 to 70.000 francs.

¹⁵² Section 149 (2).

¹⁵³ From 2.000 to 40.000 francs.

office.

Either offence is punishable with imprisonment for from one to three months and with fine¹⁵⁴.

A public servant cannot be prosecuted for an offence under this section without the prior consent of the district chief prosecutor¹⁵⁵. Moreover no prosecution may be commenced without the complaint of the relevant minister or his deputy¹⁵⁶.

§5. Torture

Section 132 (a) (new) of the Penal Code provides:

- “(1). Where torture results in the unintentional death of the victim, it shall be punished with life imprisonment.
- (2). Where, as a result of torture, the victim is permanently deprived of the use of the whole or any part of a limb, organ or sense, the punishment shall be imprisonment for from ten to twenty years.
- (3). Where torture results in illness or industrial disablement of more than 30 days, the punishment shall be imprisonment for from 5 to 10 years and a fine of from 100 000 to 1 000 000 francs.
- (4). Where torture results in illness or industrial disablement of up to 30 days or in mental or moral pain and suffering, the punishment shall be imprisonment for from 2 to 5 years and a fine of from 50 000 to 200 000 francs.
- (5). ‘Torture’ shall within the context of this Code, mean any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official or with his express or tacit consent on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or putting pressure on him or a third person, or for any other motive based on any form of discrimination whatsoever. Torture shall not include pain or suffering arising from, inherent in, or incidental to lawful sanctions.
- (6). Exceptional circumstances such as state of war, internal political instability or any other public emergency may not be invoked as justification of torture.
- (7). The orders of a superior or a public authority may not be invoked as a justification of torture.
- (8). The conditions provided for under section 10(1) of this Code shall not apply to torture.”

The definition of torture in the Code is identical to that in Article 1 (1) of the United Nations Convention against Torture. However, the Code replaces ‘acquiescence’ (in the Convention) with ‘express or tacit consent’; ‘coercing’ (in the Convention) with ‘putting pressure’; and ‘for any reason’ (in the

¹⁵⁴ From 2.000 to 25.000 francs.

¹⁵⁵ Schedule III (B), s.46 (1).

¹⁵⁶ Section 151 (2).

Convention) with 'for any other motive'. But these word changes are of no legal significance. However, it is noteworthy that 'acquiescence' is a passive attitude while 'consent' is an active one; and that 'reason' is more explicit than 'motive'.

Whereas the Convention against Torture provides that torture does not include pain or suffering arising *only* from, inherent or incidental to lawful sanctions, in the Code the word in italics is significantly omitted. The implication is that under the Code pain and suffering not arising exclusively from lawful sanctions may also not amount to torture.

Torture is severe physical/mental/psychological pain or suffering. It is punishable when it is intentionally inflicted and it results in death, maiming or illness. A public servant is guilty of the offence if he did the act himself or if he instigated it or if the act was done with his express or tacit consent. Torture is torture if inflicted intentionally and it results in death or maim or illness of the victim. The motive for the torture, however laudable or worthy (e.g., national defence, legitimate object of intelligence gathering) is rendered irrelevant by the unconditional wording 'for any other motive'. The prohibition of torture is absolute. Exceptional circumstances such as a state of war, internal political instability or any other public emergency may not be invoked as justification of torture. Furthermore, it is no answer to a charge of torture for the torturer to plead *raison d'état*, superior orders or orders of a public authority¹⁵⁷.

The universal prohibition and punishment of the crime of torture is reflected in the section 132 (a) (8) cross reference to section 10 (1) of the Code. The import of these two provisions read together is that where a citizen (or even a foreigner permanently resident in this country) commits abroad an act that amounts to torture as here defined he can be arrested and tried for it in this country whether or not the act is punishable at the place of commission and however the act is characterized by the law of the place of commission. Upon conviction of the accused the court in this country is free to pass such lawful sentence as it sees fit whatever sentence the foreign law may have provided for the act.

A number of points are worthy of note. First, the chapter under which this offence falls is entitled 'offences by *public servants* as such'. But the offence itself is not defined in relation to a public servant but in relation to *a public official*. The two expressions are not necessarily co-terminous.

Secondly, under international criminal law torture is punishable even if it does not result in say death, injury or illness. In section 132(a) however, torture per se, as distinct from its consequence or effect, is not a punishable offence. If my captor keeps me in solitary confinement and in chains for weeks, or if he hangs me upside down and repeatedly kicks me or applies electric shock to my genitals, or if he interrogates me for two days running without water or food,

¹⁵⁷ See, Article 2 of the Convention against Torture.

or if he keeps my hands manacled behind my back for several days, or if he subjects me to intense noises or electricity glare to prevent me from sleeping, clearly that is torture but that may not result in any death or maiming or illness and so my torturer would not be caught by section 132(a).

Thirdly, the offence under section 132(a) is limited to torture. The section does not punish the following distinct modes of conduct: cruel treatment, cruel punishment, inhuman treatment, inhuman punishment, degrading treatment, and degrading punishment. Yet the distinction between torture and these modes of conduct must be only academic because all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. Furthermore, torture is not only inhuman treatment which has a purpose (such as the obtaining of information or confession, or the infliction of pain or punishment) but it is also generally an aggravated form of inhuman treatment¹⁵⁸, a deliberate inhuman treatment causing very serious and cruel suffering. Physical brutalities would undoubtedly amount to torture. So too mental suffering through the creation of a state of anguish and stress by means other than bodily assault: solitary confinement, mock execution, being forced to strip naked, the use of insulting language, forms of intimidation and humiliation designed to destroy an individual's will and conscience, overcrowded detention quarters, techniques of sensory deprivation, and 'disappearances'¹⁵⁹.

¹⁵⁸ *R. v. McCormick et al.* [1977] 4 NIJB 105.

¹⁵⁹ P Sieghart, *The International Law of Human Rights*, Clarendon Press, Oxford, 1983, pp. 163-164.

Offences against Public Officials

It is critical for a proper system of public administration and for a good public delivery system that those responsible for the management of public affairs should be able to carry out their public duties with dignity, respect, and without obstruction or other interference with their person or office. The offences in this chapter aim at protecting high political office-holders, key institutions of the state and public servants.

§1. Contempt

Ordinarily, contempt is an attitude that somebody or something is completely worthless and is not deserving of respect. The Penal Code defines contempt as “any defamation, abuse or threat conveyed by gesture, word or cry uttered in any place open to the public, or by any procedure intended to reach the public.”¹⁶⁰

Contempt within the meaning of the Penal Code is therefore constituted either by defamation, abuse or threat. The manner in which any of these is conveyed or expressed is immaterial. It may be by gesture or sign, by word (written or spoken), or by cry (audible sounds). But any of these forms of conduct must be intended to reach the public. If the defamatory, abusive or threatening gesture, word or cry is uttered in a public place or in a place open to the public it is necessarily open to the public.

Defamation in criminal law is different from defamation in tort law. A person is guilty of criminal defamation if he injures the honour or reputation of another by imputations, direct or indirect, of facts *he is unable to prove*.¹⁶¹

In the law of torts defamation consists in the publication of a false and derogatory statement respecting another person without lawful justification. It is the publication of a false statement about a person to his discredit. A statement is defamatory if it exposes a person to hatred, ridicule or contempt, or causes him to be shunned or avoided by right thinking members of society generally, or which has a tendency to injure him in his office, profession or trade. It may constitute libel or slander.

Abuse, on the other hand, is any insulting expression, or contemptuous gesture or words, or invective without imputation of fact, made without having been

¹⁶⁰ Section 152(1).

¹⁶¹ Section 305(1). The offence carries a maximum penalty of six months' imprisonment and a fine of two million francs.

provoked and in circumstances of publicity¹⁶² or in private¹⁶³. An abuse here consists of ‘fighting words’, that is to say, words likely to provoke a violent reaction or retaliation from the person(s) to whom they are addressed. An abuse is delivered in an assaultive manner and, more often than not, is face-to-face or directed at a targeted group. It is thus the functional equivalent of battery.

Threat means mental or psychological violence, that is, a psychic assault (creating the apprehension of immediate force)¹⁶⁴. Any of these contempt offences not prosecuted within four months of its commission becomes statute barred¹⁶⁵.

- No prosecution for any offence of contempt lies for¹⁶⁶:
- Speeches within any legislative assembly, and any report or other document printed by order of any such assembly;
- Faithful accounts without malice of the public sittings of any such assembly;
- Proceedings in court and the speeches made and documents produced in court;
- Faithful accounts without malice of all such proceedings and speeches, *save only* of a prosecution or action for defamation;
- Publication of any judgment or judicial order, including those passed in a prosecution or action for defamation;
- An official report without malice by a person lawfully appointed to conduct an enquiry to the extent that it is germane to the enquiry;
- Imputation without malice by a superior on his subordinate;
- Information on any person given without malice to a third party having an interest, personal or official, in receiving it, or having power to remedy an alleged injustice;
- Criticism of any work of art, entertainment or opinion shown or expressed in public, provided that such criticism be not an expression of personal animosity;
- Any work of a historical nature and without malice.

The Code punishes contempt of any of the officials in points 1 and 2, and of any of the public bodies in point 3, as discussed below.

¹⁶² Section 307(1).

¹⁶³ Section R. 367(9).

¹⁶⁴ Cf. sections 301 and 302.

¹⁶⁵ Section 152(3).

¹⁶⁶ Sections 152(2) and 306.

1.1 Contempt of President, Vice President or Foreign Sovereign

A person is guilty of an offence if he commits a contempt of (that is, he defames, abuses or threatens): (i) the Republican President; (ii) the Republican Vice President; (iii) any person exercising the whole or a part of the prerogative of President or Vice president (e.g., a government minister invested with power temporarily to exercise certain presidential or vice presidential duties); or (iv) any foreign Head of State (whether on a public or private visit here or even if he has never set foot here)¹⁶⁷.

The offence carries a penalty of imprisonment of from 1 to 5 years and/or a fine¹⁶⁸. The penalty is reduced as much as by half in circumstances where the contempt is committed otherwise than publicly¹⁶⁹. No prosecution for this offence may however be begun without the prior consent of the director of public prosecutions¹⁷⁰.

Contempt of President is a crime because it consists of wrongdoing which directly or in a serious degree, threatens the security or well-being of society and it is not safe to leave it redressible only by compensation of the party injured. The President, where he takes office following a free, fair and safe election (i.e. democratically), legitimately represents the state. The legitimacy of representing the state derives, on principle, from democratic process. The French, speaking in language of much verbosity and exaggeration, say he 'incarnates the nation', a reminder of Louis XIV's 'I am the State'. In truth, however, the crime exists as purely a matter of public policy. One does not see a President suing his citizens for defamation, perpetually in court. That might deflect him from his functions of state.

Perversely, the defence of truth is unavailable to a person prosecuted under this section. In fact, the accused is not allowed to adduce evidence tending to prove the truth of the alleged defamatory matter¹⁷¹. The offences under s.153 would seem unsatisfactory because truth as a defence is excluded and this could lead to a conviction even in the absence of evidence of an intention to commit contempt. Moreover, it does violence to the desideratum of free trade in ideas in the marketplace of ideas.

It would seem the draftsman was here labouring under the unhealthy influence of the 18th century legal opinion that defamatory words equalled libel, regardless of the truth or falsity of the words. Indeed, in England of old, the Court of Star Chamber did not allow the accused to plead truth as a defence to

¹⁶⁷ Section 153(1).

¹⁶⁸ From 20,000 to 20 million francs.

¹⁶⁹ Section 155.

¹⁷⁰ Schedule III (B), s.46 (1).

¹⁷¹ Section 153(3). Supposing that D is prosecuted for allegedly defaming the President in that he published an article stating that the President is suffering from terminal prostate cancer; incredibly, D will not be allowed to establish the truthfulness of that statement by adducing supporting medical evidence.

a charge of libel. According to the jurisprudence of that infamous English court which became notorious for oppression and secret trials of religious dissenters, the greater appearance there is of truth in any malicious invective, so much the more provoking it is. It was not until 1792, with the passage of the Fox Libel Act that the British Parliament formally allowed the defence of truth to be put in on a charge of seditious libel.

In America, half a century before the English Fox Libel Act, the case of a journalist, *John Peter Zenger* (1735)¹⁷² set the stage for the right to press freedom and the judicial admission of evidence of truth as a defence to a charge of libel. The defendant was a printer charged with the crime of seditious libel for publishing items in the *New York Weekly Journal* that skewered and taunted the English governor of the colony of New York and his judicial appointees. The governor and his appointees were generally acknowledged to be greedy, corrupt and high-handed, and were frequently the subjects of much criticism and hatred.

John Zenger's newspaper carried scorching editorials and mock advertisements. In one of them a lackey of the English colonial governor was described as "a large Spaniel, of about 5 feet 5 inches high ... lately strayed from his kernel with his mouth full of fulsome panegyrics." The sheriff, another of the governor's appointees, found himself described as a "monkey ... lately broke from his chain and run into the country." Song sheets lashed out that, "The petty-fogging knaves deny us rights as Englishmen. We'll make the scoundrel rascals fly, and ne'er return again."

The governor was so outraged by these publications that he ordered four issues of the newspaper to be burnt. He then had Zenger arrested and charged with "presenting and publishing several seditious libels ... influencing [the people's] Mind with Contempt of his Majesty's Government." Zenger was detained and the bail set was three times the annual revenue from his newspaper¹⁷³. While in detention Zenger continued to produce his newspaper, dictating editorials to his wife through the door of the dungeon where he was detained. Zenger's friends instructed Andrew Hamilton, a 59-year-old lawyer from Philadelphia, to defend the journalist.

When the trial opened Hamilton admitted that Zenger had printed the newspapers, but argued that for libel to be proved it must be both false and malicious. He submitted that, "It is a right which all free men claim, and are entitled to, to complain when they are hurt; they have a right publicly to remonstrate against abuses of power in the strongest terms, to put their neighbours upon their guard against the craft or open violence of men in

¹⁷² *Great American Trials*, p. 23.

¹⁷³ It was this excessive bail placed on Zenger that later prompted the writing of the Eighth Amendment of the US Constitution, forbidding the courts from imposing any excessive bail or fine.

authority and to assert with courage the sense they have of the blessings of liberty.” The prosecution replied that libel consisted of words that were “scandalous, seditious, and tend to disquiet the people.” The trial judge overruled Hamilton, saying that on a charge of libel truth is unavailable as a defence. Hamilton then decided to build the entire case of the defence into his closing arguments before the court. In his peroration he took to a flight of powerful oratory:

“I am truly very unequal to such an undertaking on many counts. And you see, I labor under the weight of my years, and am borne down with great infirmities of body; yet old and weak as I am, I should think it my duty, if required, to go to the utmost part of the land where my service could be of any use in assisting to quench the flame of persecution upon informations set on foot by the government to deprive a people of the right of remonstrating of the arbitrary attempts of men in power. Men who injure and oppress the people under their administration provoke them to cry out and complain; and then make that complaint the foundation for new oppressions and prosecutions. ... Gentlemen of the jury ... it is not the cause of a poor printer, nor of New York alone, which you are now trying. No! It may in its consequences affect every free man that lives under a British government on the main of America. It is the best cause. It is the cause of liberty; and I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery will bless you and honor you, as men who have baffled the attempt of tyranny.”

After a very brief period of deliberation the jury returned a verdict of not guilty of printing and publishing the libels in the indictment preferred against the defendant. Zenger was acquitted. The acquittal deeply and firmly planted the roots of press freedom in America. The acquittal overthrew the then prevailing orthodox legal view that the publication of stinging criticism or ridicule of public officials was, at the very least, a threat to law and order and, at the worst, treason, and thus worthy of severe punishment as ‘seditious libel’. The verdict in the Zenger case was later characterized as ‘the morning star of liberty’. Press freedom and freedom of speech and expression were quickly embedded in the American Declaration of Independence and in the Bill of Rights of the US Constitution.

1.2. Contempt of Head of Government, Foreign Minister or Diplomatic Representative

It is an offence punishable with imprisonment for from 6 months to 2 years

and/or with a fine¹⁷⁴, for anyone to defame, abuse or threaten: (i) any head of government (i.e., whether local or foreign); (ii) any foreign minister of a foreign government; or (iii) a diplomatic representative accredited to the government of the republic (e.g., ambassador, head of mission of an international organisation, minister plenipotentiary, envoy, *chargé d'affaires*, *pro nuncio*)¹⁷⁵.

As in the previous offence, the penalty is reduced as much as by half in circumstances where the contempt is committed otherwise than publicly¹⁷⁶.

Evidence tending to prove the truth of the defamatory matter is inadmissible in any trial for an offence under this section¹⁷⁷.

Any prosecution under the section may only be instituted by or with the fiat of the Chief Law Officer¹⁷⁸.

1.3. Contempt of constituent bodies and public servants

In the tort of defamation a class of persons cannot as such be defamed. By contrast, criminal defamation can be committed against a class of persons, provided of course that the class is definite. Section 154 lists persons belonging to a definite class as well as institutions and bodies capable of being defamed.

By section 154 it is an offence to commit contempt of:

- i. Any court¹⁷⁹;
- ii. Any branch of the armed forces (Army, Gendarmerie, Air Force, Navy);
- iii. Any public body;
- iv. Any public administration;
- v. iv. Any member of a government or Assembly, federal or federated, in relation to his office or position; or
- vi. Any public servant in relation to his office or position.

Any branch of the armed forces. The French say (making reference to the organised intimidation and high-handed for which the paramilitary wing of the army known as the gendarmerie is notorious for) “The fear of the gendarme is

¹⁷⁴ From 20 000 to 20 million francs.

¹⁷⁵ Section 153(2).

¹⁷⁶ Section 155.

¹⁷⁷ Section 153(3).

¹⁷⁸ Schedule III (B), section 46 (1).

¹⁷⁹ This refers to any court, whether criminal or civil, and whether a court of superior or inferior jurisdiction, including statutory customary courts. This species of contempt is different from the contempt of court which consisting of conduct that interferes with the administration of justice or impedes or perverts the course of justice: see sections 169, 177-182. Contempt of court under section 154 (a) is concerned with conduct that defames, abuses or threatens the court, i.e. contumelious words or behaviour against the courts; in short, scandalizing the court.

the beginning of wisdom”. The force of this aphorism was brought home to Amba Ngum Monica in a case of that name, *Amba Ngum Monica v. The People* (1979)¹⁸⁰. In that case the appellant was convicted of contempt of the gendarmerie contrary to s. 154 (a) of the penal Code. Gendarme Mvogo and other gendarmes were conducting the notorious military routinised stop-and-frisk control of the people in the city of Bamenda. They signalled a taxi to pull in. The passengers were ordered to produce their identification papers. The appellant, one of the passengers, saw no reason for the identity check and declined to produce the papers requested. She complained bitterly that citizens were being denied their right to freedom of movement by these daily controls of the population by the military and expressed the view that she did not think highly of gendarmes. The gendarmes tried to arrest her and when she refused to come out of the taxi they physically manhandled her, inflicting injuries on her, which incapacity medical report estimated to be of seven days. She was charged with contempt and convicted.

Her appeal to the Bamenda Court of Appeal (Nyo’ Wakai, CJ, and Mbuagbaw, J, sitting with a military assessor) was dismissed. Delivering the decision of the Court, Nyo’ Wakai, CJ said, “The trial court did find as a fact that Monica Ngum Amba did use contemptuous language or behaved contemptuously toward the gendarme and the authority he represented at the material time. ... We are of the opinion that the conduct of the appellant on the day in question was such that would convince a bystander that she did not regard the gendarme or what he was doing in any high esteem. [T]he gendarme felt insulted and humiliated...”

Any court. An occasion presented itself in the case of *Joseph Tilili Ngoni v. The People* (1982)¹⁸¹, for the court to pronounce itself on whether disobedience to a court order comes within the mischief contemplated by section 154 (a) of the Penal Code. Sometime in 1980 one Richard Mokoma instituted an action against the present appellant (Joseph Ngoni) in the Buea Customary Court for a declaration of title to land situate at Vasingi in Buea. Before the hearing of the suit Richard Mokoma had applied for an injunction to restrain the appellant from developing the land in question. The application was heard and both parties by themselves, their servants and agents were restrained from developing the land. The court nevertheless allowed them to harvest and maintain existing crops. The appellant went on to clear the disputed piece of land in defiance of the customary court injunction and was charged with contempt of court contrary to section 154 (a).

The trial court convicted and sentenced him. He appealed. The Buea Court of Appeal (Inglis, Mbuagbaw and Gwanmesia (Mrs.), JJA) allowed the appeal

¹⁸⁰ Criminal Appeal No. BCA/24.c/79, unreported.

¹⁸¹ Criminal Appeal No. CASWP/20.c/82, unreported.

and set aside both the conviction and the sentence. In the unanimous judgment of the Court delivered by Inglis, J, the learned Justices of Appeal marshalled the following line of argument.

“The question ... is whether disobedience to a court order comes within the mischief contemplated by section 154 (a) of the Penal Code. On a plain reading of the provision of the section the answer is decidedly no. There is, however, no provision in the Penal Code that contemplates the situation before us. Section 17 of the Penal Code ordains that, “no penalty or measure may be imposed unless provided by law, and except in respect of an offence legally defined.” In that case, how can disobedience to a court order be met? The authority of the judicial system has to be upheld. Under [our] legal system ... there is statutory authority for the enforcement of court orders, which is punitive in nature. The customary courts have their place in the judicial structure but they have been divested of criminal jurisdiction. ... They cannot therefore enforce their orders. They had been given jurisdiction to enforce their orders by Part XII rules 1-3 of the Customary Court Rules 1965 which were made under section 49 of the Customary Courts Ordinance, Cap 142 of the 1948 edition of the Laws. This ordinance is a pre-independence law and is still in force in large measure.”

The learned Justices of Appeal went on:

“The provision of the Ordinance and the rules with regard to the enforcement of orders of Customary Courts are still applicable. In other words the penalties provided under part XII rules 1-3 of the Customary Court Rules are still in force. But now that Customary Courts are shorn of their criminal jurisdiction they cannot themselves enforce their orders, their orders being punitive in character, because that would smack of exercising criminal jurisdiction. The enforcement of their orders can only be done by the Magistrate’s Court after the Legal Department has brought the necessary charge under the Ordinance and rule. Now, what then is the position with disobedience to orders of Courts of First Instance and High Courts? Section 72 of the Sheriffs and Civil Process Ordinance (Cap. 189 of the 1958 edition of the Laws) ... does not lay down any specific penalty. ... In this case section 101 of the Penal Code comes into play. ... It follows from what has been discussed above that the appellant was convicted under the wrong section of the Penal Code. In that case the appellant’s conviction ought to be quashed.”

The Appellate Judges quoted with approval the dictum of Lord Goddard, CJ in *Meek v. Powell* (1952)¹⁸² where he said,

“If this had been a conviction on an indictment, which charged an offence under the wrong section, it seems clear that the Court of Criminal Appeal would have

¹⁸² 1 All E.R. 349.

had no option but to quash the conviction although the court of trial would have had power to amend the indictment.”

The prescribed penalty for an offence under section 154 is imprisonment for from 10 days to one year and/or a fine¹⁸³. The punishment is reduced where the contempt was committed otherwise than publicly¹⁸⁴.

Where the charge alleges that the contempt was by way of defamation, truth is a defence.

§2. Assaulting a public servant

2.1. General considerations

Section 156 provides special protection for public servants against assaults on them. This special protection is entirely a question of policy, and takes the form of a higher punishment for assaulting a public servant than for doing the self-same thing on any other individual. Seemingly, the policy of the law in doing so is to ensure that public servants discharge the lawful duty of their office without fear of being attacked. The severity of the punishment is considered necessary for the purpose of example.

Both a psychic assault (i.e., where the force is merely apprehended) and a physical assault (i.e., where the force actually occurs) are involved in the concept of using force against or interfering with a public servant. Indeed, since there is no requirement that actual bodily harm should occur, even a mere technical assault such as intentionally pushing a public servant out of one's way can result in liability for assaulting a public servant.

The requisite mental element, intention, must relate to each and every physical ingredient of the offence. The prosecution must therefore prove that the assailant knew his victim to be a public servant.

However, what is less clear is whether the offences under section 156 cover assaulting a public servant who is on duty only. Since the gravamen of a charge under section 156 is that the defendant assaulted a public servant, the question whether the servant was on or off duty at the material time does not appear to arise. For if a person is a public servant he does not lose that status when he is off duty. Yet, it would be absurd to hold that section 156 protects a public servant in every circumstance, including even when he is on a frolic of his own.

It is submitted that the question under section 156 is not whether the public servant was on duty at the time of the assault, but whether at that time he was acting within his lawful powers or otherwise within his lawful duties. Of course, what is the execution of duty by a public servant is, in the abstract, a question of law. If at the time he was assaulted the public servant was acting

¹⁸³ From 20 000 to 20 million francs.

¹⁸⁴ Section 155.

outside his duties, the assailant is not guilty of an offence under section 156. This submission is fortified by the decision in *Bright Akum v. The People* (1973)¹⁸⁵. What that section protects is not the status of being a public servant *per se*, but the lawful duty of an office that that status requires him to discharge. The offence of assaulting a public servant falls under crimes against ‘public authority’.

2.2. Simple assault on a public servant

By section 156(1), it is an offence to use force against a public servant or otherwise to interfere with him. The crime is punishable by imprisonment for from 1 month to 3 years and a fine¹⁸⁶. The court may in addition impose the forfeitures described in s.30 of the Code.

This provision creates only one offence, that of use of force against a public servant. The phrase ‘or other interference’ is surplusage and must be construed *ejusdem generis* with the preceding expression, ‘use of force’; in other words, the ‘other interference’ must also be conduct that amounts to force. The public servant is given protection under this section only when engaged in the lawful performance of his duties. If he is not so engaged he cannot claim the protection provided by the section.

Consider the case of *Bright Akum v. The People* (1973)¹⁸⁷. The appellant who was a debt collector, called at the Police Office where an officer was examining some documents earlier taken from him in his office. The documents related to a matter involving the appellant. The appellant demanded his documents in a harsh and loud voice and surreptitiously took one of the documents. The police officer suspected that the document had been taken by the appellant and ordered another officer to search him. The appellant refused to be searched, dashed forward and seized a document the officer had in his hand. The officer shouted for help. The appellant was forcibly searched and the document recovered from him. On these facts a two-count charge was preferred against the appellant for interference with and obstruction of a police officer in his lawful duty. The charges were laid under s. 156 (1) and 157 (1) of the Code. The Bamenda Magistrate’s Court found the accused guilty on both counts and sentenced him to imprisonment for one month. He appealed. The Bamenda Court of Appeal (Thomas, CJ, Inglis and Ekor’ Tarh, JJA) held that the appeal succeeded and directed a verdict of acquittal to be entered.

The appeal succeeded on the grounds that a police officer searching a person before he arrests him is not engaged in a lawful performance of his duty because the search of a person without having arrested him contravenes the law. A further reason for success of the appeal arose from certain points

¹⁸⁵ (1971-1973) UYLR 74.

¹⁸⁶ Of from 5,000 to 100,000 francs.

¹⁸⁷ (1971-1973) UYLR 74; (1998) 2 CCLR 127-254 Part 5, at p.143.

relating to misstatement of the law of evidence, which in the findings of the Court, amounted to a miscarriage of justice.

This case may be contrasted with that of *Sampson Lawyer v. The People* (1976)¹⁸⁸. There, the appellant, a suspected thief, physically assaulted a police officer trying to arrest him. In dismissing the appeal by appellant against his conviction by the Magistrate's Court for offences under sections 156 (1) and 157 (1), the Bamenda Court of Appeal (Ekema, CJ, Ekor' Tarh and Mbuagbaw, JJA) observed that appellant was a suspect within the meaning of section 10 (1)(a) of the Criminal Procedure Ordinance and so subject to arrest without a warrant and that this fact rendered appellant's resistance to the arrest unjustifiable.

2.3. Aggravated assault on a public servant

Subsections (2), (4) and (5) of section 156 punish what may be characterized as 'aggravated assault' on a public servant, though that term is not used in the section. A charge for aggravated assault under the relevant head will lie:

- **Where the assault is premeditated**¹⁸⁹. Here, the assault is aggravated by the mere fact that it was premeditated, not by the fact that the assault may have caused serious injury. An assault on a public servant resulting in slight injury is aggravated assault provided it was premeditated. Premeditated assault is punishable by imprisonment for from 5 to 10 years and a fine¹⁹⁰. The court may, at its discretion, impose the forfeitures described in section 30 of the Code¹⁹¹. The charge should not allege 'aggravated assault on a public servant' as such a charge would be insufficiently informative and thus be bad for vagueness. The proper charge should be 'premeditated force [or interference, as the case may be] on public servant, contrary to section 156(2) ..."
- **Where the assault results, intentionally or otherwise, in depriving the public servant permanently of the use of the whole or of any part of his member, organ or sense**¹⁹². This is assault resulting in mayhem or grievous bodily harm. The punishment is the same as that provided for premeditated assault. This is somewhat incongruous as premeditated assault may occasion only slight harm. Furthermore, the law is silent where the assault is both premeditated and results in grievous harm. Presumably the prosecution will be prosecuted under the more serious offence, that is,

¹⁸⁸ Criminal Appeal No. BCA/16.c/76, unreported.

¹⁸⁹ Section 156(2).

¹⁹⁰ From 20 000 to 500 000 francs. Section 156(2).

¹⁹¹ Section 156(3).

¹⁹² Section 156(2).

assault resulting in grievous harm.

- **Where the assault results, intentionally or otherwise, in sickness or inability to work lasting more than thirty days**¹⁹³. The punishment is also the same as in the previous case.
- **Where the assault results unintentionally in death**¹⁹⁴. The punishment for the intentional assault on a public servant resulting in unintentional death is life imprisonment¹⁹⁵. This is a much severer penalty than that provided under s. 278(1) for the selfsame act done to any other individual.
- **Where the assault is intended to cause death**¹⁹⁶. The assailant is punished capitally whether or not the intended death occurred. For there is no requirement under the provision that the assaulted public servant should in fact have died. So, no matter how benign the result of the assault, provided death was thereby intended, the assailant incurs the death penalty. What in fact section 156(5) has done is to transform what ordinarily is an attempted murder into attempted capital murder just because a public servant is involved. Since capital murder is punishable with death the prescribed penalty under that provision is consistent with the provision of section 94(1) that treats an attempt as the commission of the offence attempted and therefore punishable in like manner. As a matter of justice and fairness however the punishment is too stiff under the circumstances i.e. where death did not occur albeit that it was intended.

§3. Obstructing the execution of lawful duty

It is an offence to obstruct, whether by force or other interference, any person engaged in the lawful execution of any law, regulation, court decision or order, or other lawful order¹⁹⁷. The Code calls any such obstruction ‘resistance’ and punishes it severely. Such resistance takes different forms: simple resistance, collective resistance and political resistance. Each carries a stiff penalty. To obstruct means to impede, to prevent or to hinder.

In each of these offences the resistance must be by the use of ‘force or other interference’ and the person obstructed must, at the time, have been in the course of performing his ‘lawful duty’. In *Bright Akum v. The People*, Thomas, CJ in delivering the unanimous decision of the Bamenda Court of Appeal (Thomas, CJ, Inglis and Ekor’ Tarh, JJA) said:

¹⁹³ Section 156(2).

¹⁹⁴ Section 156(4).

¹⁹⁵ Section 156(4). *William Ngafor v. The People* (1968-1970) UYLR 56.

¹⁹⁶ Section 156(5).

¹⁹⁷ Section 157(1).

“Section 157 (1) of the Penal Code provides that the public servant so obstructed must be engaged in lawful performance of his duty. We find no evidence that the appellant was arrested by the police before a search of his person was ordered. This is a contravention of section 6 of the Criminal Procedure Ordinance. A police officer who searches a person before he arrests him is not engaged in a lawful performance of his duty. The law further provides that where an arrest was made without a warrant the person must first be notified of the reason for the arrest. Neither of these statutory requirements was fulfilled by the police. The incident resulting in this case arose from an unlawful act of the police and for that reason alone the charge should have been dismissed.”

The following cases do not fall within the terms of the resistance offences: negative passive resistance, conscientious objection, and resistance to an arrest without warrant where a warrant is required. Where the obstruction is by means other than those provided in sections 157 and 158, the accused would have committed a mere simple offence punishable under section R.370 (6) of the Penal Code.

The evil that the three resistance offences seek to prevent is unlawful resistance to legal authority. The duty that the person is obstructed from performing must be a duty imposed by law, and not merely a duty imposed by the terms of his employment. The nomenclature of and prescribed punishment for each resistance offence vary, depending on factors such as the number of persons involved in the obstruction, whether the offender(s) bore arms, and whether the obstruction was of a political character.

An ‘arm’ for the purpose of any of the resistance offences means any weapon made or adapted for use for causing injury to the person or intended by the person having it with him for such use by him. Whether the term includes use of so-called ‘juju’ or witchcraft to cause injury is open to doubt. The law does not sanction belief in paranormal phenomena. The term does however bear a narrower meaning than it does under section 117.

It is noteworthy that in these offences, when the question of arms arises the law only requires proof that the arm was borne i.e., that the person had it with him on his person. There is no requirement that the arm should have been used to effect the obstruction. Whether it was so used or not is an irrelevant fact and need not be proved.

3.1. Simple resistance

The offence of ‘obstructing execution of lawful duty’ is characterized as ‘simple resistance’ where the obstruction is by any number of persons from one to four. In *Asih Isaiah Emene v. The People* (1979)¹⁹⁸ two gendarmes went to

¹⁹⁸ Criminal Appeal No. BCA/19.c/79, unreported.

a village to serve ‘convocations’ (i.e. written notifications) on some resident there. In the market the gendarmes met the appellant, for whom they had one such document. The gendarmes invited appellant and informed him they had a notification for him. Appellant refused to accept the document. He used abusive and insulting language on the gendarmes. He slapped one of them and grabbed him by his shirt. When the other gendarme intervened he pulled off the epaulette from his left shoulder. He was subsequently charged with simple resistance, prosecuted and convicted. He appealed.

The Bamenda Court of Appeal (Nyo’Wakai, CJ, Mbuagbaw and Anyangwe, JJA) held that the appeal must succeed. In the unanimous judgment of the Court delivered by Mbuagbaw, J their Lordships were of the view that the facts of the case as emerged from the evidence before them did not warrant a conviction for an offence under section 157(1). “In the course of arguments before us, it came to light that the facts of this case do not support a conviction for an offence under section 157 (1) of the Penal Code. We are of the opinion that the learned trial magistrate did not clearly comprehend the entire case and came to a conclusion which is not supported by the evidence.”

Their Lordships however did not indicate what facts emerged in the course of the arguments before them that made a conviction under the section untenable in law. The gendarmes, however they may be hated and despised by the generality of the people, were acting in the performance of their lawful duty. The appellant verbally and physically assaulted them. One would have thought that such conduct on the part of the appellant clearly amounted to ‘obstruction’.

In *Sampson Lanyer v. The People* (1976)¹⁹⁹ decided three years earlier the same Court of Appeal, though differently constituted (Ekema, CJ, Ekor’ Tarh and Mbuagbaw, JJA), in dismissing an appeal against a conviction under sections 156(1) and 157(1) said: “If we accept as in fact we have done that 1st prosecution witness [a policeman] lawfully arrested the appellant and he resisted not passively but with force and assault on 1st prosecution witness then the resistance was not justified. The resistance could have been justified if the act of the 1st prosecution witness was illegal. But this was not the case as the police officer acted well within the law in the discharge of his duty.”

Zacharia Wanta v. The People (1979)²⁰⁰, is another case in which the Bamenda Court of Appeal (Nganje, Mbuagbaw and Anyangwe, JJA) allowed an appeal against a conviction under section 157. Gendarmes went to a rice-hauling mill to investigate a complaint of an allegation of theft of a bag of rice taken to the mill for husking. The owner of the mill, the appellant, ordered his workers not to co-operate with the gendarmes, saying they had no right to enter his mill

¹⁹⁹ Criminal Appeal No. BCA/16.c/76, unreported.

²⁰⁰ Criminal Appeal No. BCA/40.c/79, unreported.

without being formally authorized to do so. He called the gendarmes thieves and pushed one of them out. The gendarmes refused to leave. They seized the register kept at the mill and went through it. A charge of simple resistance was subsequently laid against appellant and he was convicted. The conviction was rightly quashed on appeal (Nganje, J delivering the unanimous decision of the Court) on the ground that key items of evidence very material to the case, the register kept at the mill and the testimony of the complainant, were inexplicably excluded by the court below and that this exclusion was fatal to the case as it meant that the case against the defendant was not properly established.

The case of *Ayeab Patrick v. The People* (1981)²⁰¹ also involved gendarmes. A gendarme on patrol duty in the vicinity of Fundong town suspected the contents of cartons he saw two people carrying and stopped the individuals. He took their identity cards and ordered them to follow him to town with the cartons for their contents to be verified. On the way he stopped at a bar to enlist the assistance of some other gendarmes who were reportedly having a drink at that bar, but they had left. As he came out of the bar he was accosted by a group of people, including the appellant who asked the gendarme to hand back the identity cards to the owners, as they were his relatives.

When the gendarme refused to obey the appellant gripped him while the rest of the group forcibly removed the identity cards from the gendarme's pockets, handed them back to the owners and the crowd dispersed, taking with them the cartons that were the object of the gendarme's suspicion. Because of the obstruction the contents of the suspicious cartons could not be verified. The appellant and those who acted in concert with him were eventually identified, arrested, prosecuted and convicted under section 157(1). It is not clear why the charge was laid under section 157(1) and not under section 158, which deals with resistance where five or more people are involved.

The appellant was the only one who appealed. The Bamenda Court of Appeal (Nyo'Wakai, CJ, Njamnsi and Anyangwe, JJA) had no difficulty in allowing the appeal on the ground of the inquisitorial nature of the conduct of the trial by the lower court.

“Although the court has wide powers under section 222 of the Evidence Ordinance to put questions to a witness in the course of a trial this power must be exercised discretely. The court cannot interpolate into an examination-in-chief or cross-examination questions so frequent as to diminish the effectiveness of the examination. In the instant case the Magistrate asked too many questions at the stage of the cross-examination of the defence witnesses. For this reason we think the conviction of the appellant cannot stand.”

²⁰¹ Criminal Appeal No. BCA/19.c/81, unreported.

In coming to this conclusion the Court whose unanimous decision was delivered by Nganje, J relied on the authority of *R v. Welwyn Justices, Ex parte Jones*²⁰² in which a conviction was quashed because of the persistent questions which the Magistrate asked during the proceedings.

The punishment for simple resistance is imprisonment for from three months to four years where, in the case of a sole offender, he was not armed, or in the case of two, three or four co-offenders, none of them was armed²⁰³. However, the punishment becomes imprisonment for from one to five years where a sole offender, or anyone of two, three or four co-offenders was armed²⁰⁴.

3.2. Collective resistance

The crime of ‘collective resistance’ is committed when five or more persons together obstruct a person in the lawful execution of his duty.

As in the previous offence the severity of the punishment for this offence depends on whether any of the co-offenders was armed or not at the time of the obstruction. If none of them was armed the punishment for any of them found guilty is imprisonment for from one to three years²⁰⁵.

But if any *two* among them *openly* bore arms the punishment quintuples. Each of the co-offenders, though they did not bear any arms incur a penalty of imprisonment for from 5 to 15 years upon conviction²⁰⁶. Those among the co-offenders who themselves actually bore arms, open or concealed, incur a like penalty upon conviction²⁰⁷.

The reason for treating co-offenders who do not bear arms on the same footing of equality of punishment as those who bear arms appears to be that the former by not disapproving of the arms openly borne by some among them thereby tacitly sanctioned that conduct. They place themselves at the same level of moral guilt as if they had themselves borne arms.

3.3. Political resistance

A ‘simple resistance’ or a ‘collective resistance’ of a political nature attracts the heavy penalty of life imprisonment.

The concept of ‘political nature’ is a fluid one. Presumably it means ‘motivated by political considerations’ or ‘for political ends’. If this interpretation were correct cases of civil disobedience such as positive passive resistance, tax resistance, etc would probably be caught by this provision.

²⁰² 1969 Criminal Law Review 616.

²⁰³ Section 157 (1).

²⁰⁴ Section 157 (2).

²⁰⁵ Section 158 (1).

²⁰⁶ Section 158 (1).

²⁰⁷ Section 158 (2).

§4. Offences of ‘subversion’

Ordinance No. 62/OF/18 of 12 March 1962 (Repression of Subversive Activities) as amended by Law No. 63/LF/30 of 25 October 1963 created five nebulous political offences, each of them denoted as an offence of ‘subversion’. The term ‘subversion’ is itself not defined. These offences were cognizable by military tribunals and are routinely used by the Yaoundé government to silence meaningful opposition to despotic rule; to suppress dissent; to deny freedom of speech and expression; to deny free trade in ideas; to muzzle the press; to punish righteous criticism of misrule, endemic corruption and maladministration; and to shield those holding political office and other public officeholders from criticism and public accountability. As early as 1964 the International Commission of Jurists had expressed grave concern about these ill-defined and open-ended offences and called for their repeal²⁰⁸. However, this has not happened, half a century on. A few years ago the controversial and highly questionable piece of legislation was repealed, but its contents were simply lifted *in toto* and inserted into the Penal Code. The offences are thus still useable by the Yaoundé government for the same purposes they have hitherto been put to.

4.1. Incitement to resist the application of laws

“Anyone who in any manner whatsoever incites any other person to resist in any manner whatsoever the application of laws, decrees, regulations or orders of any public administrative authority” is guilty of an offence and liable to imprisonment of up to three years and to a fine.

The offence punishes the inciter and not the incited. The offence is consummated as soon as there has been an incitement. The fact that the person incited did not give ear to the instigation is irrelevant. But the incitement must be one to resist the application of some law of a public administrative authority. If the incitement was for some other purpose the inciter cannot be properly prosecuted under this provision. Further, if the person incited does in fact resist the application of a law then it may well be that he can be prosecuted under section 157 of the Penal Code.

Furthermore, the means of incitement and the method of resistance are also immaterial. Incitement is incitement whether done artfully, by suggestion, persuasion, verbally, in writing, by broadcast, by the Internet, by SMS or by whatever means. Similarly, whether the resistance takes the form of a peaceful demonstration, a violent protest, a campaign of civil disobedience, or by

²⁰⁸ ICJ, ‘Emergency Laws in the Federal Republic of Cameroon,’ 20 *Bulletin of the ICJ*, September 1964, p. 7.

questioning the legality or legitimacy of the law makes no difference.

4.2. Contempt of or ridiculing any public authority

It is an offence punishable by imprisonment of up to 5 years and a heavy fine for “any person to act in any manner likely to bring into contempt or ridicule any public authority.”

This offence is akin to the ‘contempt’ offences under sections 153 and 154 of the Penal Code. However, whereas the offences under those sections require that contempt be actually committed this offence requires only a likelihood of the public authority being brought into contempt or ridicule. To secure a conviction for this offence the law requires only that the impugned act be one *likely to bring*, not that it actually brings, into contempt or ridicule any public authority. It is therefore unnecessary to show that the public authority was in fact brought into contempt or ridicule, so long as the act done can be construed as likely to have that effect.

Contempt is defined by section 152 of the Penal Code as “any defamation, abuse or threat conveyed by gesture, word or cry uttered in any place open to the public, or by any procedure intended to reach the public.” The decisive test is the publicness of the act of ‘defamation, abuse or threat’. A defamatory, abusive or threatening statement made in private is not legally contempt within the meaning of section 152.

In the Yaoundé case of *Procureur Général de la Court d’Appel de Yaoundé v. Owona Robert* (1964)²⁰⁹ the respondent wrote a letter to the senior district officer of his district complaining of his ill-treatment by an assistant district officer of the locality. The letter, sent under confidential cover through the usual administrative channel, came to the notice of the assistant district officer who considered its contents to be offensive and injurious to him. He had the respondent arrested, tried and convicted by the Yaounde military tribunal for having acted in a manner likely to bring into contempt or ridicule public authority. The respondent unsuccessfully appealed to the Yaounde Court of Appeal.

On further appeal, the Yaoundé *Cour Suprême*, significantly a court composed entirely of French expatriate judicial officers (Messrs. Corre, Mollion, Parant), held that the alleged abuse was not public since the letter in question had been sent under confidential cover, and that it had not been shown that in writing the letter the respondent had the intention to ridicule public authority. In the opinion of the Court, “The scope of the Ordinance of 12 March 1962 cannot be extended to acts foreign to the subversive activities which the enactment aims at suppressing.”

This case was a solitary enlightened decision on a judicial landscape littered

²⁰⁹ Cour Suprême du Cameroun Oriental, Arrêt No. 36 du 15 décembre, 1964, Bulletin No. 11, 1964, p. 904.

with the corpses of victims of the Subversion Ordinance.

4.3. Inciting hatred against the government

“Any person who incites hatred against the government” commits an offence and is liable to imprisonment for up to five years and to a heavy fine.

This offence is similar to the crime of sedition. It punishes anyone who arouses anti-government sentiment among the people, anyone who whips up a wish for the overthrow of the government. The offence is consummated as soon as the incitement is made. It is of little consequence that there was no response to the incitement. Acting or not acting on the incitement is irrelevant.

Further, the method by which the incitement may be effected is irrelevant. Simply acting in a particular way may be enough. Indeed, mere criticism however well intentioned and righteous may suffice, particularly if such criticism tends to portray the government as bad, callous, ineffective, inept, and corrupt. Consider the Yaoundé case of *Ministère Public c. Victor Kanga et Autres* (1966)²¹⁰.

In 1966 the defendant was moved in a cabinet reshuffle from the post of Minister of Finance to that of Minister of Information and Tourism. He considered this a demotion and was unhappy with this change in his fortunes. Shortly afterwards an anonymous pamphlet started circulating in the towns of Yaounde and Douala. The document was entitled ‘A Victim of Duty’. It claimed that Victor Kanga had been moved from Finance Minister because he had tried to uncover and expose misappropriation, graft and other corrupt practices by certain ministers in Ahidjo’s cabinet, especially fraudulent acts in the Yaounde Central Pharmacy. Ahidjo was incensed. Although the document was anonymous the government considered Kanga to be its author.

Kanga was accordingly dismissed as minister and a week later arrested on charges of ‘publishing false news’. Dissemination of false news is a ‘subversion’ offence. There was therefore talk of subversion and a foiled coup d’état. During the trial the prosecution contended that the impugned document was intended to discredit and incite hatred against the government. Kanga replied that his trial was a case of persecution because he had stumbled across damaging evidence of embezzlement and that those concerned wanted to be rid of him. Significantly the trial lasted a mere four hours. It was as if the court’s mind on the issue of guilt had been made up right from the outset. There was therefore little surprise when the defendant was convicted and sentenced to five years’ imprisonment and disqualified for a further period of five years from holding any public office.

4.4. Taking part in a subversive enterprise

“Any person ... who takes part in any subversive enterprise against the

²¹⁰ C Anyangwe, *The Magistracy and the Bar in Cameroon*, CEPER, Yaounde, 1989, p. 63.

authorities of the Republic ... or who aids and abets any such enterprise” commits an offence and is liable on conviction to imprisonment for up to five years and to a fine.

This provision proved to be a very handy weapon in the hands of the Yaoundé government in its long-drawn fight against the insurrectionist movement known as the *Union des Populations du Cameroun* (UPC). In 1955 the UPC launched an armed struggle against the French for the independence of French Cameroun. Although the French granted that country independence on 1 January 1960 the UPC continued its armed struggle arguing that true independence had not yet been achieved as the French had handed power to a French puppet regime. It was only in 1971 that the UPC insurgency was defeated. The crime of ‘taking part in a subversive enterprise’ was used to prosecute in military tribunals any person taking part in that insurgency in any capacity whatever, whether as ‘*maquisards*’ (i.e. guerillas) or merely showing any form of sympathy for the cause of the insurgents, or providing any form of assistance or help (even if under duress) such as supply of food, water, money, drinks, shelter, transport of any kind, intelligence. The provision was also used to prosecute anyone who failed to inform the authorities of the presence of the insurgents in their locality²¹¹.

Refusal to vote in public ‘elections’, especially where the refusal is collective, may amount to subversion and prosecuted under this provision. In *Ministère Public c. Mengué Damaris Règine et 44 Autres* (1971)²¹² the 45 defendants, most of them illiterates, were adherents of the Jehovah’s Witness religious sect. They refused to vote at the 1971 presidential ‘elections’ on the ground that their religion does not permit them to participate in politics. They were arrested, charged and prosecuted in the military tribunal for “engaging in conduct likely to compromise public security, infringe the laws of the land or impair authority and national unity.” All but two of the defendants were convicted and given various stiff sentences.

4.5. Dissemination of false news

The ‘subversion’ law punishes by imprisonment of up to five years and/or a heavy fine “any person who publishes or reproduces any false statement,

²¹¹ For the use of the ‘subversion’ law in the fight against the UPC insurgency see, for example, the following unreported cases by various military ad hoc tribunals sitting in Douala and Yaoundé in the 1960s and early 1970s: *Ministère Public c. Kameni Adolphe*, Jugement No. 4/67 du 6 mars 1967; *Ministère Public c. Ngolé Martin*, Jugement No. 5/67 du 6 mars 1967; *Ministère Public c. Tchaté Martin*, Jugement No.2/67 du 6 mars 1967; *Ministère Public c. Kamnekeu Maurice (alias voie sûre) et Nguessu Lucas (alias sans culotte)*, Jugement no. 1/67 du 3 mars 1967; *Affaire Mgr Albert Ndogmo et Autres*, Janvier 1971; *Affaire Ernest Ouandié et Autres*, Janvier 1971; *Ministère Public c. Foé Gorgon et Akoundou Augustin*, Jugement No. 1/60 du 3 décembre 1960; *Ministère Public c. Betteng Josué*, Judgment No. 20/67 du 22 mai 1967.

²¹² Tribunal Militaire Permanent de Yaoundé, Jugement No. 71 du 15 mars 1971.

rumour or report or any tendentious comment or any statement or report which is likely to bring into hatred, contempt or ridicule any public authority.” This offence closely resembles but is not the same as the similarly named offence of ‘false news’ punishable under s. 240 of the Penal Code.

This offence is probably the most obnoxious of the subversion offences as it makes a very serious inroad into freedom of expression, speech and the press. The offence punishes not only the publication and reproduction of any false statement, report or rumour but also the publication and reproduction of statements and reports, which, although true, are accompanied by alleged tendentious comments, be they direct or indirect. In *The People v. Martin Yai, JF Gwellem and SN Tita* (1970)²¹³ the defendants, respectively reporter, editor and publisher of the *Cameroon Times* newspaper, published in December 1969 a lead story captioned ‘Tataw Installed Sector Commander’. The article described the public military ceremony in Buea at which the Minister of Armed Forces commissioned Tataw, a military officer, to take command of the western military sector. The article went on to report that at a speech read during the ceremony the Minister ‘pointed an accusing finger’ at members of the military for behaving in what was formerly the British Southern Cameroons as an army of occupation. The defendants were arrested and tried by a military tribunal sitting in Buea. The case of the prosecution was that the publication was likely to bring members of the armed forces into contempt and hatred with the civilian population of that territory. Defendants were convicted.

The social and political context of this case gives a better perspective of the matter. At that time the former British Southern Cameroons went by the name ‘West Cameroon’. The military force in the territory since October 1961 consisted (and still consists) essentially of soldiers from the former French Cameroun (which achieved independence on 1 January 1960 as *République du Cameroun*). The language, tradition, training and behaviour of the military are French. The brutality and annoying ubiquity of these soldiers and the fact of their Frenchness in an English-speaking environment led to they being generally perceived by people as an army of occupation. This sentiment among the population has always been an open secret, something not unknown to the Yaoundé authorities. So when the Minister in his speech called on the soldiers to be disciplined and of good behaviour at all times it was easy to interpret the remark as a veiled call for the soldiers to stop behaving in the territory like an army of occupation.

The *Cameroon Times* newspaper found itself in trouble again when on the 29th August 1970 it carried a lead story captioned ‘Bishop Ndongmo arrested for alleged subversion’ and in which it reported that Ernest Ouandie, the UPC guerilla leader ‘gave in’ to government forces. The reporter, editor and publisher

²¹³ ‘Fate of *Times* men at military tribunal – reporter jailed, editor, publisher fined,’ *Cameroon Outlook*, Wednesday February 11, 1970, p. 1.

were arrested and charged with publishing false information. The case, *The People v. Martin Che, Peter Etah Oben and SN Tita* (1970)²¹⁴, was tried by the military tribunal at Buea. The guerilla leader was at last in the hands of the government forces. That was a fact and so there was nothing false about the piece of information put out by the newspaper. What was false, the prosecution contended, was the impression conveyed by the words ‘gave in’. To give in, it was argued means to ‘surrender’ and that as a matter of fact Ernest Ouandié did not give in but was ‘captured’ by government forces. The newspaper report that he gave in, the prosecution submitted, tended to undermine and ridicule the government in suggesting that government forces were unable to capture Ouandié and would probably not have succeeded in capturing him had he not turned himself in. The defendants were convicted.

§5. False statement, fraud at examinations

There is no general fraud offence in the Penal Code. Therefore, a fraud committed by an individual that is outside the purview of specific crimes dealt with in the Code passes unnoticed by the Code. Only in sections 163, 331, 334, and 336 does the Penal Code punish ‘fraud’ as distinct from ‘forgery’.

5.1. False statement misleading public servant

The criminal law does not, generally speaking, sanction lie telling. It leaves it to the moral law to take care of that human failing. It does however intervene in certain circumstances to punish lie telling where the consequences of such mendacity are deemed sufficiently serious for society.

Section 162 punishes certain cases of falsehood that have the effect of misleading a public servant. There are five such cases.

- **Any false statement that influences the conduct of a public servant.**

By section 162(1), “whoever by any false statement influences the conduct of a public servant” is guilty of an offence and liable to imprisonment for from 15 days to 3 months and to a fine²¹⁵. For example, a false statement in a tax return form, a false statement in a customs declaration form, a false statement in a visa or passport application form, a false statement in a residence permit application form, a false statement in a work permit application form. These are all instances in which the false statement negatively influences the conduct of the public servant. In *The People v. Kwah David Annim*

²¹⁴ ‘Trial at begins at military tribunal on 3 *Times* men,’ *Cameroon Outlook*, Wednesday October 21, 1970, p. 1.

²¹⁵ From 5.000 to 50 000 francs.

(1979)²¹⁶ one of the counts in the charge recited as follows: “That you ...by a false statement, to wit, a letter dated ... to the Prosecutor General through the Magistrate Bamenda Court One influenced the conduct of a public officer, to wit, the Magistrate in Bamenda Court Two, to order the arrest and detention of another, to wit ... and thereby committed an offence contrary to and punishable under section 162 (1) of the Penal Code.”

Whether the crime is also committed where the false statement influences positively the conduct of the public servant is an open question. On a strict construction of the provision it matters not whether the conduct of the public servant was influenced negatively or positively, provided the statement that influenced the conduct was false. In reality, and for reasons of expediency, the police are unlikely to initiate prosecution in circumstances where the false statement positively influenced the conduct of the public servant. It is provided in Schedule III (B), section 46(2) that no prosecution for this offence may be instituted without the consent of a superior police officer.

- **Any false statement in a civil status register.**

Anyone who makes any false statement relating to the registration of any birth, marriage or death commits an offence and upon conviction is liable to imprisonment for from 3 months to 3 years²¹⁷.

- **Any false statement on oath.**

Any false statement made on oath (e.g. in an affidavit) attracts the heavy penalty of imprisonment for from one to five years²¹⁸. A statement of this nature is perjury outside of a judicial proceeding. It differs from perjury in a judicial proceeding under section 164 in that under section 162(3) it is sufficient to prove that the statement was false and that it was made on oath; whereas under section 164 the prosecution must go further and show that the false evidence was *capable* of influencing the decision, in other words, that it was a material false piece of evidence. Furthermore, under section 162(3) the false statement may be written or verbal, whereas under s.164 it would invariably be oral. Finally, whereas s.164 focuses on false evidence during court proceedings, civil or criminal, the false statement on oath under section 162(3) need not have been made at a judicial proceeding. For the purpose of the law of corroboration however, the offence

²¹⁶ (2000) 1CCLR 1-125 Part 6, p. 83.

²¹⁷ Section 162 (2).

²¹⁸ Section 162(3).

under section 162(3) is treated as an offence of perjury²¹⁹. Section 162(3) should also not be confused with section 166 that punishes false oath. There the offence is committed when a party to civil proceedings swears falsely.

- **Procuring, by any means, the entry in the criminal record of any one person of the conviction of any other**²²⁰.

This conduct is a species of fraud since the defendant brings about the entry of A's conviction in B's criminal record thereby falsely representing that B had been convicted of that offence. The offence is punishable by imprisonment for from 1 to 5 years.

- **Procuring, by any means, the improper issue to one's self of an extract from the criminal record of another person.**

This reprehensible conduct is another species of fraud and carries a penalty of imprisonment for from 1 month to 1 year. The situation contemplated here is this; 'A' has a bad, and 'B' a clean, criminal record. 'A' then improperly gets an extract of 'B's criminal record to be issued to him, thereafter representing falsely that he has a clean criminal record.

5.2. Fraud at examinations

Section 163 enacts: "Whoever commits any fraud at an examination or competition with intent thereby to procure his entry into any public service, or any degree, certificate or qualification issued by the state or a public service, whether national or foreign shall be punished with imprisonment for from one month to three years" and/or with a fine.

Fraud. This term, as used here, means the obtaining of a material advantage by unfair or wrongful means. It involves obliquity. It involves the making of a false representation knowingly, or without belief in its truth, or recklessly.

'Examination or competition'. The word 'competition' must be interpreted *ejusdem generis* with the preceding word 'examination'. That word must be taken to come within the same genus as 'examination' and 'test'. Cheating or fraud say, at a sporting, musical, or art competition does not fall within the purview of section 163. Examination, of course, includes oral examination, a test (e.g. a driving test), assignment and other method of evaluation of knowledge.

With intent. This is one of the few instances in Book II of the Penal Code in

²¹⁹ Schedule III (B), section 52.

²²⁰ Section 162(4).

which the law requires proof of specific intent apart from the general intention to commit the offence. Be it noted that section 163 does not punish mere fraud at an examination. What it punishes is fraud at an examination committed *for the purpose of procuring entry into a public service, or for the purpose of being admitted to a degree, certificate or qualification issued by the state or a public service.*

It does not therefore seem that cheating at a class test or promotion examination come within the terms of section 163. Such cases are normally dealt with by school regulations and often attract the disciplinary sanction of a failed mark, suspension or dismissal from the institution.

Offences against Public Revenue, Property, etc

Sections 183 *et seq.* deal with certain types of conduct considered as a hindrance to or a clog on public service performance. Some are punishable because they impact negatively on the public revenue (refusal of tax, misappropriation of public funds), others because they are tantamount to an encroachment on public or government property (damage to public or protected property, removal and destruction of public records, unauthorized taking of copies of government papers), others still because they impinge on the operation of government service (disturbance, resistance to work), and yet others because they amount to a defiance of public authority (breach of seals, defacement of posters, innkeeper's register, illicit burial).

§1. Offences against the public revenue

Three main types of conduct negatively affect the public revenue: corruption, refusal to pay taxes, and stealing of government money. Corruption has already been dealt with. Here two offences will be considered, namely, misappropriation of public funds, and refusal of tax.

1.1. Misappropriation of public funds

A person is guilty of an offence of 'misappropriation of public funds' under section 184 (1) if 'by any means' he "takes or keeps dishonestly any property, moveable or immovable (sic), belonging to, in transmission to or entrusted to the United State (sic), or to any authority or corporation either public or subject to the administrative control of the State, or in which the State holds directly or indirectly the majority of the shares."

The draftsmanship of this offence is patently infelicitous, introducing as it does, an element of wilful opacity into the definition of the offence. The word 'funds' in the heading of the offence is a misnomer because the crime as couched is not confined to money resources but covers any property, movable or immovable, and provided it is of monetary value since the severity of punishment for an offence under the section depends on the monetary value of the public property misappropriated. The cloudy definition notwithstanding, careful thought will extract some sense from it, especially as the mischief of the provision seems clear enough.

Misappropriation under section 184(1) is the dishonest *taking* or *keeping* of any public property. It was anciently known as embezzlement. 'Misappropriation of public funds' under section 184 differs from 'theft by misappropriation' under section 318(1)(b) only in one important particular. In the former offence the property misappropriated belongs to the state or any of

its agencies, whereas in the latter crime the property belongs to a private individual or entity. In both offences, be it noted, the crime is one of ‘misappropriation’ and not of theft *simpliciter* since the embezzler had lawful possession of the property he defalcated. The essence of either crime is thus breach of trust. And for that reason some jurisdictions conflate both offences and punish them as the single crime of criminal breach of trust.

By any means takes or keeps dishonestly. Taking dishonestly is one offence. Keeping dishonestly is another offence. One count of an indictment under section 184(1) cannot charge both a taking and a keeping as such a count would be bad for duplicity. To take means to appropriate, that is, to act in relation to the property in question as if one were the owner thereof. To constitute ‘taking’ under section 184 it is not necessary for the embezzler to take the property completely into his physical possession. The section speaks of taking or keeping *by any means*. If the embezzler moves the property or causes it to move he has in contemplation of law taken the said property. The term ‘keep’ means ‘retain possession of’. It connotes conversion of the property, that is to say, dealing with the property in a manner inconsistent with the right of the owner, as for example the state treasurer who puts public funds into his own bank account, the public official who fails to deposit public funds in a distinct bank account.

In itself however, mere taking or keeping is not enough. For the taking or the keeping to be tantamount to defalcation it must be done dishonestly, that is, without the free consent of the owner or the defendant’s honest belief that he is the owner. There must be an element of fraud. If there is no dishonesty or if the amount of money allegedly misappropriated is not quantified the charge must fail. In *Mah Michael Tansah & Fon Patrick Yangsi v. The People* (2005)²²¹, the prosecution’s case against Michael Tansah, at that time the Divisional Delegate of Education for Bui Division, was that he received from the Government Treasury at Kumbo the sum of 8 171 000 francs to pay contract teachers but had dishonestly taken the salaries of teachers who had died or abandoned their duties and used the same to pay a driver, typist, Patrick Yangsi (2nd appellant) and other non-contract teachers. In fact according to the audit report compiled after an investigation into this matter 1st Appellant misappropriated the total sum of 18 659 861 francs. The 2nd Appellant as paymaster of contract teachers in Bui Division used his identity card to collect the salaries of several teachers, including “ghost workers.” According to the prosecution the entry in the payment book of his identity card number against the names of some contract workers amounted to forgery. The sum of 502 872 francs was allegedly found with him. The prosecution claimed he misappropriated the total of 1 507 966 francs.

²²¹ Criminal Appeal, No. BCA/3c/2002, unreported.

This convoluted case necessitated the holding of a preliminary inquiry which ended in the appellants being committed for trial in the Bui High Court. The indictment was misappropriation of public funds contrary to section 184(1)(a) and forgery contrary to section 144. The essence of the prosecution's case was that 106 extra contract teachers recruited by Appellants were in fact ghost workers fictitiously employed to fill the pockets of the Appellants. At the end of the trial, appellants were convicted and sentenced even though the exact amount allegedly misappropriated was never determined. They appealed. Their defence was that they never misappropriated the funds meant for payment of contract teachers. Held, (Morfaw, CJ, President, Tume, Njumbe, JJA, Vice Presidents, per Njumbe, JA) allowing the appeal and vacating the decision of the trial court, (1) that the exact amounts the Appellants were alleged to have misappropriated were never determined whereas these had to be ascertained because the penalties in section 184 of the Penal Code under which both were charged and convicted depend strictly on the amount found to have been misappropriated; (2) that the payment *per se* made by the Appellants to other workers of the Delegation of Education were by no means evidence of bad faith or the intent to defraud that must be proved in cases of misappropriation; (3) that for there to be a conviction under section 184 of the Penal Code there must be proof not only of the loss suffered by the state but above all, that the perpetrator of such loss did cause that loss dishonestly; there was no evidence that the funds from the state had not reached the intended beneficiaries and no teacher had complained of not receiving their salary; there was thus no evidence in the records from which the trial court could have deduced dishonesty on the part of either Appellants; (3) forgery under the Penal Code is committed when a person fraudulently makes or alters whether in its substance, or dates or signatures of another any deed or writing to the prejudice of the right of another; in fact the notion does not so much consist in the counterfeiting of another's writing or signature but rather in trying to give the appearance of truth to a mere deceit and falsehood; the fact that 2nd Appellant appended his identity card number against the names of some of the teachers (entries he did not deny) did not constitute a forgery of an official act.

In *Kavas DibukaK Daniel v. The People* (2006)²²², the particulars of offence in this case tried in the Boyo High Court state that the Appellant sometimes in the month of August 2000 at Fonfuka in the Menchum Judicial Division being the sub-treasurer of Fonfuka Rural Council kept dishonestly the sum of 4 692 909 francs the property of the State. He was convicted. The prosecution's case is that an audit conducted at the treasury where appellant was sub-treasurer revealed the cash situation showed a total deficit of the amount in the statement of offence and that Appellant could not give a satisfactory account of this deficit. Appellant's case is that all the monies withdrawn from the bank

²²² Criminal Appeal, No. BCA/MS/37c/2004 unreported.

had been properly used in the interest of the council. At the hearing of the appeal against the decision of the trial court, the Court of Appeal (Njumbe, Ambe, Angyiembe, JJA, Vice Presidents, per Njumbe, JA) observed that there was a discrepancy between the sum allegedly misappropriated and the sum ordered by the trial court to be paid into the State coffers.

The Court also noted that the trial court had not given any reason why it found that appellant had misappropriated the sum of money representing the cash shortage in his accounting book. The various vouchers tendered by the appellant are proof, observed the Court, that this particular sum of money was well accounted for. Moreover, said the Court, Appellant as a mere custodian of this money had no authority to stop the mayor of the Rural Council from spending it. There was thus no evidence of misappropriation against the Appellant. In the view of the Court, a court cannot base its findings on speculation. In order to secure a conviction under section 184 the prosecution must show evidence of fraud on the part of the accused. The Court accordingly concluded that the conviction and sentence of the Appellant were not proper and so set them aside.

A mere inquisitive taking of property merely to ascertain what it is does not amount to misappropriation. If the defendant mistakenly believed that the property is his, he can raise the defence of honest claim of right. He can also set up the defence of mistake if he was labouring under an honest and reasonable mistake of fact.

If the accused did take or keep the property the law is not concerned with how the taking or keeping was done. The law does not require proof of any particular means used by the embezzler in taking or in keeping the property. For, the provision speaks of taking or keeping 'by any means'.

Public property. Public property of any nature and of monetary value is capable of being misappropriated. The property may be immovable property (land, buildings), choses in action (shares, patents, copyrights, trademarks, debts), or movable property such as vehicles, furniture, water, electricity, gas, plants, animals in captivity (e.g., in a zoo, botanical garden or greenhouse) or in a state of natural liberty (e.g., in game parks, protected forests), stationery, money or cheques. In *The People v. Anthony Patupe Haden* (1972)²²³ a letter containing a Postal Money Order came to the possession of the defendant when it was wrongly sorted into his newspaper office's post office box. He opened it, saw the money order, inserted the words imputing the forgery on both sides of the document, took it to the Victoria Post Office, located by the seashore, for encashment, and actually presented it to the Postmaster for that purpose. The postal order was for 2 000 francs and it had earned for the Post Office chest, a commission of 60 francs. When the Postmaster saw the

²²³ (1971-73) UYLR 56.

document presented by the defendant for encashment, he examined it closely. The manuscript on it, which related to the defendant, aroused his suspicions. When he started making enquiries to ascertain its genuineness, the defendant grew noticeably uneasy and escaped. He made straight for the sea when attempts were made to apprehend him. He was only arrested with the help of Police Officer Paxson Agbor Tabi who succeeded in getting him to swim back to the shore to be arrested, after firing a warning shot over him as he swam away to make good his escape.

One of the counts of the bill of indictment preferred against him accused him of attempted misappropriation of public funds contrary to section 94 as read with section 184(1)(c) of the Penal Code. In convicting him on this count Endeley, CJ sitting at the Buea High Court addressed his mind to the critical question whether the 2 000 francs due on the Money Order could properly be classified as public money within the mischief contemplated by section 184. The learned Chief Justice said:

“The answer to this comes out clearly and easily when one examines the procedure that leads to the issue of a Postal Money Order. The transaction is a simple and commonplace banking transaction. In consideration of commission paid by the person transmitting the amount covered by the Money Order, the Post Office undertakes full responsibility for paying over the said amount to the Money Order’s addressee on the presentation of the Order over a Post Office counter. As it is the case with banks, the Post Office will be under an obligation to repay the money to its lawful owner if it carelessly paid it over to the wrong person. Had the 2,000 francs been paid to the defendant under this fraud the Post Office would have been liable to pay it again to Miss Ebude [the addressee of the Money Order] if Mr. Sylvester Nsike [sender of the Money Order] had followed the matter up using the counterfoil of the Money Order, which was still in his possession. The 2,000 francs was at all material times in the possession and under the control of the Post Office. The attempt to steal it while it remained so brings the offender within the mischief contemplated by section 184 of the Penal Code.”

The defendant was accordingly found guilty and, after taking into account certain mitigating factors, sentenced to 2 years’ imprisonment.

Most of the cases involve misappropriation of public property in the nature of funds. But the misappropriation of any other public property of monetary value may be prosecuted under the section, *provided always that the monetary value of the property misappropriated is stated in the indictment*. In *The People v. Kwah David Annim & Tita Sikod Choh* (1979)²²⁴, the charge was properly drawn when it alleged as follows:

“COUNT 1. That you ... took dishonestly, movable property belonging to the

²²⁴ (2000) 1 CCLR 1-125 Part 6, p.83.

Government ... to wit, a petition ... valued at 667 CFA francs ... and thereby committed an offence contrary to and punishable under section 184(1) (c) of the Penal Code. COUNT II. That you ... kept dishonestly, movable property belonging to the Government ... to wit, a petition ... valued at 667 CFA francs ... and thereby committed an offence contrary to and punishable under section 184(1) (c) of the Penal Code.”

In that case the accused got away scot-free on a technicality. The Bamenda Court of Appeal (Nganje, Mbuagbaw and Anyangwe, JJA) held that the case was tainted with a glaring procedural defect apparent on the record, which went to the root of the case. Per Nganje, J delivering the unanimous decision of the Court, “The defendants did not make any plea to the charges against them. ... [W]e hold that the defect is such that it cannot be said that there is an appeal before us, the trial having been a nullity. We accordingly hold and hereby hold and declare the trial void *ab initio*.”

Under section 184 the property defalcated must be ‘public property’. Property is public within the meaning of the section if it:

- Is in transmission to the State, or
- Is entrusted to the State, or
- Belongs to the State, or
- Belongs to any cooperative, or
- Belongs to any collectivity (i.e., any territorial unit of the State), or
- Belongs to any government body or establishment, or
- Belongs to any corporation which is either subject to the administrative control of the State or is one in which the state holds directly or indirectly the majority shares.

An opportunity presented itself in *Peter Zub Mbuh v. The People* (1968)²²⁵ that enabled the judicial construction of the meaning of the phrase ‘in transmission to the State’. The appellant, a Clerical Assistant attached to the House of Assembly in Buea placed orders for books and stationery valued at 163.730 francs from the Basel Mission Bookshop, Victoria, without being entitled or empowered to do so, but under the guise that he was doing so for the House of Assembly. Endeley, J sitting at the High Court in Buea convicted him of the charge of misappropriation under s.184 (1) of the Penal Code and sentenced him to 10 years imprisonment. On appeal it was submitted by the respondents that inasmuch as the appellant ordered the goods as by the Government, the ownership in them passed to the Government as soon as they arrived, and that the appellant by taking them for his own use, stole them. Respondents contended in the alternative that the goods were in transmission to the

²²⁵ (1968-1970) UYLR 13.

Government and that therefore the taking of them by the appellant rendered him guilty under section 184(1).

The West Cameroon Court of Appeal (Cotran, CJ, Kesiro and Dervish, JJA) disagreed with both submissions, allowed the appeal and quashed the conviction and sentence. It held that the property in the case never belonged to or was in transmission to the State and that the words 'in transmission to the State' in section 184(1) envisage at least an interest in the goods by the Government, even though the Government may not know that such goods were being transmitted to them. Their Lordships made the following important observation:

“We are of opinion that the ownership in the goods never passed to the Government for the simple reason that the Government never ordered them and they never intended to order them. They never knew that such an order was placed in their name, and the appellant not being empowered or authorised to place orders on behalf of the Government could not legally do so. Equally we hold that the goods were not in transmission to the Government because the Government, as we have already said, never had any interest in the goods, and though due to the deceit used by the appellant the Basel Mission Bookshop believed that they were being transmitted to the Government, they were in fact not being so transmitted. All what it amounts to is that the appellant obtained the goods by false pretences, the falsity being that the Basel Mission Bookshop were falsely led to believe by the appellant that they were supplying the Government with the goods whereas in fact that was not so. We believe that the words 'in transmission to' in s. 184 (1) envisage at least an interest in the goods by the Government, even though the Government may not know that such goods were transmitted to them. In the present case the trial court had evidence before it that the Government did not order the goods, did not know of the order and that they did not even need or want the goods. The Government lost nothing in the whole transaction.”

Attention may be drawn to section 184(6) in terms of which the crime of 'misappropriation of public funds' does not apply to the misappropriation and receiving of military property. The misappropriation of military property is peculiarly covered by the military justice code.

Punishment. Misappropriation of public property is punished more severely than the theft offences under section 318. Moreover, there, the punishment does not take account of the amount of money stolen or value of the stolen property. Under s.184 however the severity of the punishment varies, depending on the value of the property misappropriated. No difficulty of determining the value of the thing stolen arises where it is money (as well as cheques, treasury bills, a winning lottery ticket, a travel ticket, etc.) that is involved.

In the case of other kinds of property the prosecution may, if need be, have recourse to an expert to make a valuation. In *The People v. Kwah David Annim & Tita Sikod Cho* (1979)²²⁶ a petition stolen by 1st appellant from the office of the Divisional Officer was valued at 667 francs. The charge preferred against him accused him of “taking dishonestly moveable property belonging to the Government, to wit, a petition valued at 667 francs, ... and thereby committed an offence contrary to and punishable under section 184(1)(c).”

When the prosecution puts a monetary value on property allegedly misappropriated evidence on the ascertainment of that value must be forthcoming. The valuation is open to challenge by the defence. This may entail a trial within a trial and an interlocutory ruling by the court on that point and, if need be, a consequential amendment of the charge or even a dismissal of the charge if the value is unascertainable from the evidence before the court²²⁷.

The severity of punishment depends on the monetary value of the misappropriated property as follows²²⁸:

- Imprisonment for life, if the value of the misappropriated property is more than 500 000 francs;

The amount of money misappropriated in the case of *Emmanuel Ebot Tabe v. The People* (1970)²²⁹, was the sum of 709 414 francs and Endeley, J sitting at the High Court in Buea passed a sentence of 20 years imprisonment. The appellant, Emmanuel Ebot Tabe worked in the Prime Minister’s Office as a finance clerk. He was solely responsible for the receipt, accounting for and payment into the Treasury of all revenue collected by the Division of State Development in the Prime Minister’s Office. He was also in sole charge of the safe wherein all such monies were kept. One morning he raised an alarm that all the monies in the safe had been stolen. In reality this was a staged robbery to avoid the consequences of the theft by the appellant of the money in the safe. Police investigations led to the appellant who was arrested, prosecuted, convicted and sentenced to 20 years imprisonment. He appealed to the West Cameroon Court of Appeal (Cotran, CJ, Dervish and O’Brien Quinn, JJA), which dismissed the appeal and upheld the conviction and sentence.

The amount involved in *The People v. Jacob Ewumbe Monono* (1981)²³⁰ was much higher. The accused was a seventy years’ old man who had retired after 22 years of service with the Cameroons Development Corporation (CDC). At the time of the events that gave rise to him being prosecuted for

²²⁶ Criminal Appeal, No. BCA/11.c/79, unreported.

²²⁷ *The People v. Joseph Ngupa* (1968) W.C.L.R. 23.

²²⁸ Section 184(1)(a)(b)(c).

²²⁹ (1968-1970) UYLR 121.

²³⁰ Charge No. HCSW/10.c/80, unreported.

misappropriation of 61 drums of CDC oil valued at 1.685.040 francs, he was a sub-cashier at the CDC Head Office in Bota. Inglis, J sitting at the Buea High Court had no difficulty convicting him. The Judge took the advanced age of the convicted person as a mitigating factor and, praying in aid sections 90, 91 and 184(2), sentenced him to 10 years' imprisonment.

In Bamenda the Court of Appeal (Nyo'Wakai, CJ, Njamnsi and Anyangwe, JJA) confirmed the conviction and sentence of another cashier who, while working at the Kumbo sub-Treasury, misappropriated the sum of 2 739 000 francs being monies collected from the various councils in the district and paid into that sub-Treasury: *Pius Tata Wirdzenyuy v. the People* (1982)²³¹.

Inglis, J sitting in the Buea High Court sentenced the cashier in the case of *The People v. Lobe Jerome Bokwe* (1976)²³² to 20 years' imprisonment. At all times material to the case the defendant was the cashier at the Treasury in Buea. His duties were, *inter alia*, to receive all revenue paid over the counter and to see that all proper official receipts were issued in respect of such payments and to prepare decadal accounts for transmission to the Ministry of Finance. For that purpose he kept a cashbook. Sums of monies amounting to 2.297.500 francs were paid by one of the prosecution witnesses to the accused who issued temporary receipts for them. The accused could not account for these monies. Original and duplicate entries for the relevant period were torn from the cashbook that was in his sole custody. The Buea High Court convicted and sentenced him for misappropriation of that gross sum.

In *Oume Noubet Thaddee v. The People* (1978)²³³ the Buea Court of Appeal (Endeley, CJ, Inglis and Gwanmesia (Mrs), JJA) was decidedly lenient with a Postmaster in charge of the Victoria Post Office who helped himself with 590 000 francs from the Post Office kitty and with a further 600.000 francs by forging postal cheques. Njamnsi, J sitting at the High Court in Buea gave him 20 years. He paid back the total sum of 1 190 000 francs misappropriated. The conviction was confirmed on appeal but the sentenced reduced to 6 years on the reasoning that the appellant's confession, his repayment of the money misappropriated and the fact that he was a first offender were mitigating factors that justify a reduction of sentence the way the Court did. It is submitted that the sentence was wrong. Upon a finding of mitigating circumstances the lowest sentence the Court is legally entitled to impose for the amount of money misappropriated cannot be less than 10 years as Inglis J. rightly pointed out in *Jacob Ewumbe Monono*.

One of the early important cases on embezzlement (misappropriation) of

²³¹ Criminal Appeal, No. BCA/9.c/82, unreported.

²³² Charge No. HCSW/40.c/75, unreported.

²³³ Criminal Appeal, No. CASWP/17.c/77, unreported.

public funds is that of *Thomas Mbeng Mbeng*²³⁴. In that case a person of that name was convicted in the High Court at Buea in May 1966 by Gordon C.J., on a two count charge of stealing government funds in excess of 500 000 francs entrusted to his care as the Keeper of the Imprest Account at the Federal Inspectorate at Buea and was sentenced to twenty years imprisonment with hard labour. He appealed against this decision to the West Cameroon Court of Appeal (Stewart C.J., Kesiro and Mitchell JJA.). The Court allowed the appeal against the conviction on the first count, upheld the conviction on the second count but reduced the sentence to one of six years imprisonment with hard labour, having taken into account certain mitigating circumstances and the provisions of sections 90 to 93 of the Penal Code. The chief law officer of the State of West Cameroon appealed to the Federal Court of Justice on a point of law relating to the application of the terms of sections 90 to 93 to the case, but the appeal was dismissed with costs.

- Imprisonment for from 15 to 20 years, if the value of the misappropriated property is an amount above 100 000 francs but not exceeding 500 000 francs;

Mr. Justice Niger-Thomas slapped 18 years on a CDC storekeeper who stole two CDC chain saws valued at 134 500 francs. This happened in the case of *The People v. William Nchabannu Nkemasong & Boniface Acha Nkemasong* (1973)²³⁵. The Cameroon Development Corporation (CDC) employed the 1st accused at Mukonje, Kumba, as a storekeeper. The articles in the Store kept by the 1st accused included two chain saws. One day the 1st accused reported that the Store in question had been broken into. The two chain saws were found missing and suspected stolen. Police investigations led to the arrest of the two accused. The 2nd accused, blood and elder brother of the 1st accused of the same parents, was charged with being accessory after the fact by sheltering the 1st accused. The court found the charge against him not made out and acquitted him. The 1st accused was charged under section 184(1)(c) with theft of the two CDC chain saws, the monetary value of which was put at 134 500 francs. He was found guilty as charged and given 18 years' imprisonment with hard labour, no doubt because the court was informed (after the finding of guilt) that accused was already serving a three years' sentence for theft.

In *The People v. Michael Emeb Ebung* (1976)²³⁶ the accused, a clerk in charge of the Muyaka Sub Divisional Office, misappropriated the proceeds (total

²³⁴ First decided in the High Court at Buea in 1966, then on appeal in 1967. See (1968) W.C.L.R. 83.

²³⁵ (1970-73) UTLR 157.

²³⁶ Charge No. HCSW/53.c/74, unreported.

amount of 124 381 francs) of the sale of a number of West Cameroon State lottery tickets. Njamnsi, J sentenced him to 2 years imprisonment saying, “I consider the fact that the defendant is a first offender, a young man and the fact that he has paid the sum of money misappropriated as strong mitigating factors to warrant the invocation of section 91 of the Penal Code.” In *The People v. Augustine Yens Ngalim* (1976)²³⁷ another embezzler of the proceeds of the sales (299 550 francs) of West Cameroon State Lottery tickets received by him got a 5 years’ suspended sentence from Nganje, J. sitting in the Bamenda High Court. The mitigating factors in that case were fatherhood, no previous conviction and a trouble-free record of salesmanship of West Cameroon State Lottery since its inception in the mid-sixties. The Court ordered the amount embezzled to be paid back to the Government.

The defendant in *The People v. William Makolo Loka Kinge* (1975)²³⁸ had been a civil servant for seventeen years, had risen to the rank of chief clerk and became the Revenue Collector for his Ministry. The duties he performed were the collection of licensing fees for the possession of petroleum, for the operation of electrical installations and fees for the registration of contractors. These fees he had to pay into the Treasury. He received, during the relevant period, the sum of 422 500 francs, paid into revenue 203 750 and failed to account for the balance of the money. Inglis, J sitting in the Buea High Court found the evidence of the defendant to be a ‘tissue of lies’ and also found that defendant committed the crime ‘with a design well worked out’. Defendant was accordingly convicted and, the Court finding no mitigating factors in the commission of the offence gave him 15 years.

The defendant in *The People v. Francis Njje Gobina* (1975)²³⁹ fared far better as Njamnsi, J sitting in the Buea High Court sentenced him to five years’ imprisonment. The facts on which Francis Gobina, who was prior to the case a Prisons Warder for 18 years, was convicted were that he signed for and received 220 bags of cement on behalf of the Prisons Department Buea from R & W King Victoria on three separate occasions but subsequently converted them to his own use. After convicting the defendant and listening to the *allocutus* (what the convicted person has to say why the court should not proceed to pass judgment upon him) by defence counsel the learned trial Judge accepted that there were mitigating circumstances in the case. “I accept as mitigations the fact that the defendant has rendered 18 (eighteen) years of stainless service as a prison warder, he is a first offender; married with six children and the fact that the defendant is a young man and consequently invoke section 91 of the Penal Code but without losing sight of the fact that the offence of misappropriation of public funds is rampant and on the

²³⁷ Charge No. HCB/3.c/76, unreported.

²³⁸ Charge No. HCSW/19.c/74, unreported.

²³⁹ Suit No. HCSW/23.c/75, unreported.

increase. Therefore the defendant in this case is sentenced to five years.”

In *Cho Zacheus v. The People* (1981)²⁴⁰ the appellant was even luckier for his appeal against conviction and sentence to 2 years’ imprisonment by the lower Court succeeded. Appellant, Cho Zacheus, was a driver employed by X who had the monopoly of transporting produce from the Nkambe Area Co-operative Union to Bota, Victoria. He went to the Co-operative Union and picked up 88 bags of palm kernels valued at 369 600 francs ostensibly to take to Bota, but he instead delivered them at the X’s store in Bamenda. At the trial in the lower court X who gave evidence accepted full responsibility for the loss of the produce and offered to compensate the Union for the full value of the produce. The trial court nevertheless convicted Cho Zacheus of misappropriation of the goods and ordered him to compensate the Co-operative Union. The Bamenda Court of Appeal (Nyo’ Wakai, CJ, Anyangwe and Arrey, JJA) held, allowing the appeal, that the appellant was the wrong person to have been prosecuted and convicted and that X who confessed to the offence is the proper person to have been charged.

In *The People v. Marcus Mbome & 2 Others*²⁴¹ the three accused, employees of the West Cameroon Government Forestry Department based in the department’s Kumba office, were jointly charged with the misappropriation of the sum of 293,458 francs, property of the West Cameroon Government, thereby offending against section 184 (1)(b) of the Penal Code. The money was received by first defendant, the financial clerk, from the Kumba Sub-Treasury as temporary imprest for the payment of the wages of daily workers. It was clear that the money had been misappropriated by one of the three accused but that one person could not be identified. Held, per Endeley, J., acquitting all three defendants, that before drawing the inference of the guilt of the accused persons from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference; and that where defendants are charged with a criminal act, but only one unidentified defendant commits it, the court must, in the absence of proof of a common design, ascertain who was the actual perpetrator, or failing this, must acquit all²⁴².

- Imprisonment for from 5 to 10 years, if the value of the misappropriated property is 100 000 francs or less.

In *Jacob Moka Mofor v. The People* (1981)²⁴³ a court registrar was convicted

²⁴⁰ Criminal Appeal, No. BCA/37.c/81, unreported.

²⁴¹ (1968) W.C.L.R. 73.

²⁴² See also following unreported cases: *The People v. David Eyambe*, WC/39c/68; *The People v. Mathias Ashu Tako*, WC/47c/68.

²⁴³ Criminal Appeal, No. BCA/30.c/81, unreported.

and sentenced to 4 years' imprisonment for misappropriating 7 600 francs being the witness expenses of a prosecution witness since deceased. Appellant was Chief Registrar in the Mbengwi Magistrate's Court and X was a prosecution witness in a case before that court. At the end of the trial X presented his witness summons to appellant as the Registrar-in-Chief for him to cause a payment voucher for the witness expenses of 7 600 francs to be prepared. Appellant took the summons and asked X to come back after some days, but X died shortly afterwards. Y reported X's death to appellant and offered to collect the deceased's witness expenses on the strength of an authorization from the family of the deceased. Appellant rejected the authorization and insisted on Letters of Administration from the High Court, a document Y considered impossible to get. Appellant later forged the written authority on the back of the payment voucher, with which he subsequently claimed and misappropriated the witness expenses of the deceased. He was convicted and given four years. The Bamenda Court of Appeal (Njamnsi, Asu and Arrey, JJA) dismissed the appeal that was taken out against both conviction and sentence.

The appellant in *Thomas Mosenja v. The People* (1971)²⁴⁴ fared no better. He was cashier of the Lotteries Section of the Secretariat of Finance in West Cameroon. He was responsible for submission of un-issued lottery tickets to the Audit Department prior to their destruction after each draw. Shortly after draw No. 4 of 1969, X cashed in Kumba an un-issued lottery ticket for 10 000 francs. X was charged along with the appellant. It was X who informed the Police that he had received the said lottery ticket from the appellant. A charge under section 184(1)(c) was preferred against appellant. He was found guilty of stealing the sum of 10 000 francs, property of the Government and sentenced to 5 years' imprisonment. An appeal to the West Cameroon Court of Appeal (Kesiro, O'Brien Quinn and Ekema, JJA) was dismissed as without merit. The Court observed, *obiter*, that appellant could well have been charged with stealing both the lottery ticket and the monetary value of the ticket and, on conviction, the sentences on the two counts would have been ordered to run concurrently.

In *Dighou Luc v. The People* (1978)²⁴⁵ the statement of offence alleged "misappropriation of public funds, contrary to and punishable under sections 74 and 184 of the Penal Code". The particulars of offence recited that the appellant "misappropriated public funds to wit, the sum of 8 000 francs which [he] received to pay into Government Treasury." The appellant was convicted and sentenced by the lower court. On appeal, the Bamenda Court of Appeal had no difficulty in allowing the appeal on the grounds, *inter alia*, of vagueness of the charge.

²⁴⁴ (1970-73) UYLR 29.

²⁴⁵ Criminal Appeal, No. BCA/17.c/77, unreported.

“We note that in the statement of offence, appellant was indicted for ‘misappropriation of public funds contrary to and punishable under sections 74 and 184 of the Penal Code’. There is no offence known to our penal law which is punishable under section 74 ... Needless to say that the same offence cannot be punished under two sections of the same law. To that extent the statement of offence was vague and was fatal to the proceedings.”

A submission of ‘no case to answer’ was upheld and the accused accordingly discharged on the merits in *The People v. Pius Fusi*²⁴⁶. In that case the accused, acting Senior Superintendent of Police at Kumba, was charged with misappropriating the sum of 100 000 francs from the Police Information Fund, the money being the property of the West Cameroon Government. The charge was laid under section 184(1)(c) of the Penal Code. The sum of money came into the defendant’s possession as the officer in charge of the police at Kumba. When he was requested to account for the money he explained that he had paid it out but had failed to account for the expenditure in the books. At the end of the prosecution’s case a submission of ‘no case to answer’ was made by the defence on the ground that the evidence as a whole did not bear out the charge laid. Finally, J. in the High Court of West Cameroon sitting at Kumba upheld the submission on the ground that all that the prosecution had been able to point out against the accused was that he never kept readily auditable records of the way he expended the money he was administering. He observed:

“The Commissioner of Police in his evidence under cross-examination, admitted that the money allocated for the Information Fund could also be utilised and was in fact often utilized for the entertainment of Police informants. Of the monies received from this Fund by Mr. Shyntum there is no suggestion by the prosecution that the informants to whom he paid it issued receipts which he handed to the defendant. He himself did not issue any receipts for what he received. He was not even definite of what he received. There is no suggestion that because he was Ag. S.S.P. the defendant did not himself receive fruitful police information in circumstances which entitled the informants to direct payments from the Information Fund. ... All the prosecution have been able to point out so far against the defendant is that he never kept readily auditable records of the way he expended the money he was administering. I dare say that in keeping with understandable police practices, it was quite impossible for him or indeed anyone else administering such a fund to keep what can be considered a proper account of the expenditure of money allocated under this head. The defendant is perhaps lazy, careless and/or negligent. He is perhaps unfit to hold an office like that he held which called for the responsibility for the administration of a fund as vulnerable to fraud as the evidence before me portrays

²⁴⁶ (1968) W.C.L.R. 30.

this Police Information Fund to be. But these foibles while being manifestly reprehensible, do not themselves amount to criminal offences.”

An important principle to be abstracted from the cases under this head is that the prosecution must state in the charge and prove in court the monetary value of the property alleged to have been misappropriated. The prosecution cannot by filing a charge under either paragraphs (a), (b) or (c) of sub-section (1) of section 184 invite the court to infer from the charge thus filed the value of the property allegedly misappropriated. In *The People v. Joseph Ngupa*²⁴⁷ the defendant was charged with misappropriation of six galvanized corrugated iron sheets valued 900 francs the property of the Public Works Department of the Government of West Cameroon, thereby offending against section 184 (1)(c) of the Penal Code. The defendant pleaded not guilty to the charge. The defendant was a foreman of works employed by the Public Works Department. He was placed in charge of the site for the construction of buildings for the West Cameroon Local Government Training Centre at Buea. One day he conveyed the six corrugated sheets, the subject of the charge, and some mixed concrete in a P.W.D. vehicle to the premises of a house he was renting at Small Soppo Buea. He off-loaded the goods at the said premises. The vehicle got stuck in mud and this aroused the suspicion of some plain clothed police detectives who happened to be around.

The defendant was questioned as to the circumstances of the removal of the building material from the P.W.D. building site. Investigations were conducted, leading to the defendant being charged with misappropriation. The defence was that the corrugated iron sheets in question had been taken openly with the leave of the Yard Superintendent; that they had been condemned as useless and officially abandoned; and that they were never recorded as property of the P.W.D. in any official or non-official stores record Book or assigned to any particular use. Endeley, J. in the High Court of West Cameroon sitting at Buea held that the accused raised a reasonable doubt as to how he came into possession of the corrugated iron sheets. There was no proof that the sheets were the property of the P.W.D. Furthermore, there was no evidence as to the value of the sheets. Accordingly, the prosecution failed to prove its case with the certainty that the law calls for to justify a conviction²⁴⁸.

²⁴⁷ (1968) W.C.L.R. 23.

²⁴⁸ A strikingly similar case is that of *R. v. Nicholas Vega* (1938) 4 W.A.C.A. 8, an appeal from the Southern Cameroons High Court sitting at Bamenda. The West African Court of Appeal, on facts similar to those in the *Ngupa* case and the same defence of abandoned property, came to the same conclusion. *Vega* was, however, neither cited by counsel nor judicially considered by Endeley, J. It is often cited for the following propositions. Mistake of law is not a credible defence, but a mistake that is one of a mixture of law and fact would be if honest and reasonable. If an accused honestly believed that the property taken by him has been

Sentencing. In determining the appropriate sentence to pass on conviction for an offence under section 184(1), the court must, among other things, advert its mind to section 184(2)(3)(4)(5). Section 184(2) in effect excludes the full interplay of sections 91 and 92 when determining sentence under section 184(1). Sections 91 and 92 deal with mitigation generally and empower the court to reduce sentence upon a finding of mitigating circumstances in favour of a person convicted whether for felony, misdemeanour or a mere regulatory (simple) offence.

Section 91 thus gives the court the discretion to reduce, in the case of any offence characterized as a felony, a penalty of death to as low as 10 years imprisonment, a penalty of life imprisonment to as low as 5 years imprisonment, and any other custodial penalty for felony to as low as 1 year imprisonment. Under section 92 a finding of mitigating circumstances in respect of any offence characterized as a misdemeanour, entitles the court to reduce any custodial penalty to as low as a token 5 days imprisonment and any penalty of a fine to as low as a mere symbolic fine of 1 franc.

Now, were the full effect of sections 91 and 92 to apply in respect of s.184, then upon a finding of mitigating circumstances in favour of the embezzler, the penalty of life imprisonment could theoretically be reduced to as low as 5 years imprisonment, the penalty of 15 to 20 years' imprisonment to as low as just 1 year imprisonment, and the penalty of 5 to 10 years' imprisonment to as low as a mere 5 days imprisonment.

But section 184(2) provides that the prescribed punishment for misappropriation of public funds may not be reduced, whatever the mitigating circumstances that may be found in favour of the embezzler, below 10, 5 or two years as the case may be. Furthermore, enforcement of the sentence passed may not be suspended. This is so notwithstanding the fact that section 54(1) gives the court a discretionary power to suspend the enforcement of a sentence it has passed on a first offender.

That is that all. Section 87(2) directs that where responsibility is reduced for more than one reason, or where there are in addition mitigating circumstances, the minimum penalty shall be the token sentence of 5 days imprisonment provided by section 92(1). But section 184(3) overrides this provision by providing that where section 87(2) is applicable the punishment may not be reduced below 5 years, 2 years or 1 year, as the case may be, and that execution may not be suspended except in case of diminished responsibility for infancy.

abandoned he is entitled to be acquitted, since he has not acted fraudulently. At common law things of which the ownership has been abandoned are not capable of being stolen; therefore, if there is any ground for supposing that an accused may have believed an article found was abandoned, the trial judge must carefully direct himself on the subject.

Thus subsections (2) and (3) of section 184 appear to be at variance with sections 54 (1), 87 (2), 91 and 92. In reality the former provisions constitute derogations from the general principles enunciated in the latter provisions. The derogations are consistent with section 2(2)(3) of the Code in terms of which a special provision overrides a general provision on the same matter. The maxim of the law is *generalibus specialia derogant*.

When it passes a sentence of imprisonment on the convicted embezzler the court *must* also invoke sections 30, 33 and 35 by imposing forfeitures, ordering publication of the judgment, and ordering confiscation of the proceeds of the offence as well as any property that may have been used as an instrument of commission of the offence²⁴⁹. But, inexplicably, the courts seldom invoke these provisions.

1.2. Refusal of tax

Section 183 creates three tax refusal offences: organizing a collective refusal of tax, instigating public refusal of tax, and instigating public delay in paying tax.

By section 183(1), any person who by any means organizes a collective refusal to pay any tax is guilty of an offence and liable to be punished with imprisonment for from 3 months to two years and with a fine²⁵⁰.

First, the prosecution must prove that there was a refusal to pay tax. Secondly, it must further prove that the refusal to pay the tax was collective, that is, the refusal was by a group of people. The size of the group is immaterial. Thirdly, the prosecution must also prove that the collective refusal was organized, that is, planned or arranged. A spontaneous refusal to pay any tax, no matter how widespread does not fall within the terms of section 183(1). Furthermore, a mere exhortation or call not to pay tax also does not fall within the scope of the subsection. However, if there is an organized collective refusal to pay tax, the law takes no account of how or the means by which the organisation was done. Nor does the law bother about the kind of tax involved, direct or indirect tax, business tax, land tax, poll tax, property tax, etc.

It is an offence under section 183(2) for anyone to instigate the public to *refuse* the payment of any tax. An appeal to the public not to pay tax amounts to instigation whether or not the appeal is heeded. And it matters not how the appeal is made, whether by way of political activism, through the media, through handbills, or through speeches. Provided always that the appeal is addressed to the *public* (that is, the people generally) rather than to a specific target group (say, unionised workers in a particular industry).

It is also an offence under the same subsection for anyone to instigate the public to *delay* the payment of any tax. Payment is delayed when it is made after

²⁴⁹ Section 184 (4)(5).

²⁵⁰ From 200 000 to 2 million francs.

the expiry of the period during which it is due or after the extension period for payment, if any.

These two offences are some of the instances in which the law punishes abetment as an autonomous offence²⁵¹. In each instance the punishable by imprisonment for from 6 months to 1 year and with a fine²⁵².

It is clear that under s.183 the tax must be one lawfully imposed, that is to say, a constitutionally valid tax. There can be no legal or other duty to pay an illegal tax. It is therefore a credible defence to any charge under this section that the tax in question is illegal.

§2. Offences against government property

2.1. Damage to public or protected property

It is an offence to destroy or to deface any public or protected property²⁵³. The offence is punishable by imprisonment for from 1 month to 2 years and a fine²⁵⁴.

The words ‘destroy’ and ‘deface’ do not necessarily mean the same thing. To destroy means to damage, that is, to cause a thing to lose its value, its attractiveness or its usefulness. By contrast, to deface means to spoil the appearance or legibility of something by marking or damaging the surface. If A writes graffiti on a wall, he would have defaced but not necessarily destroyed it. But if he did the graffiti on a painting in an art gallery, he would not only have defaced it but destroyed it as well. Much then depends on the type of property involved. A destruction or defacement may be partial or total.

The property in question must be public property or protected property. Property is of this type if (i) erected by or at the behest of public authority for public use or adornment (e.g., monuments, statues, sports complexes, road signs, buildings, recreational facilities); or (ii) it is protected movable or immovable object, or natural feature or site (e.g., game reserves, botanical gardens, protected species, forest reserves, paintings and artifacts in a museum, an item of office furniture, a computer, a typewriter). Let it be supposed that a disgruntled employee vandalises an office computer by physically destroying it or by destroying any programme or data in it such as by ‘hacking’. He can be

²⁵¹ The other instances of abetment punished as an autonomous offence include: habitually furnishing places of refuge or assembly to malefactors (section 99 (2)), instigating a foreign power to undertake hostilities against the state (section 103 (a)), instigating or encouraging the gathering of insurgents during an insurrection (section 116 (a)), the punishment as an accessory of the public servant who fails to protect private rights (s.146), accessory after the fact by shelter (section 194), delivery of arm or ammunition to a person without ascertaining that he is licensed to keep it (section 237 (3)), aiding or facilitating another person’s prostitution (section 294 (1)), and receiving (section 324).

²⁵² Of from 50 000 to 1 million francs.

²⁵³ Section 187.

²⁵⁴ Of from 20 000 to 120 000 francs.

convicted under the section.

2.2. Removal, destruction of public record

A person is guilty of an offence and liable to punishment by imprisonment for from 1 to 5 years and with a fine²⁵⁵ if he ‘abstracts, removes or destroys any document in the custody of any public authority’²⁵⁶.

It is worthy of note that ‘abstract’, ‘remove’ and ‘destroy’ of any public document are independently punishable acts. There is no requirement that the abstraction or the removal must be followed by destruction or that the destruction must be consequent upon a removal. Also, an abstraction need not necessarily involve a removal, and vice versa. Hence, it is an offence to abstract a document in the custody of any public authority; an offence to remove a document in the custody of any public authority; and an offence to destroy a document in the custody of any public authority. The destruction *in situ* of a document is an offence.

If a person makes a summary of, or copies, the content of a document he would have abstracted the said document but without removing it. If he takes a document from the place where it is normally kept and hides it elsewhere in the same room he would have removed, but not abstracted, it. But if he stealthily or fraudulently gets hold of a document and takes it away, conceivably he would have both removed and abstracted it. It is no defence that the accused intended to put back the document from where it was removed.

A further point to note is that s.188 (1) only requires that the document be in the custody of a public authority and not that the said authority must have ownership of it or even have known of the existence or actual location of the specific document. A document is a thing in writing, print, inscription, or a drawing, map, plan, photograph, tape recording, video recording and film, giving information about something.

Section 188 (2) speaks of ‘any document’. The nature or type of document is thus immaterial. Thus computer data and programmes would also be documents. Hackers are able to destroy computer data or programmes by invading computer files using scams described in a variety of colourful names such as ‘the Trojan Horse’²⁵⁷, ‘the logic bomb’²⁵⁸, ‘life is beautiful. pps’²⁵⁹, etc.

²⁵⁵ From 10 000 to 200 000 francs.

²⁵⁶ Section 188(1).

²⁵⁷ This scam alters instructions in the programme prior to the programme’s execution so that instructions self-destruct upon the programme’s execution.

²⁵⁸ This scam is an addition to a computer system timed to be executed at a scheduled monument to effect transfer of funds or to sabotage systems by erasing tapes or crashing the system.

²⁵⁹ This scam is an additional file sent to the system which when opened crashes the system by announcing ‘too late, there is no life’.

However, there are certain types of computer vandalism that cannot be prosecuted under this section. Let it be supposed that the data diddler fraudulently introduces data into a computer system for criminal purposes such as payments to a fictitious payee. Supposing also that a computer thief, using the scam known as ‘the salami technique’ accomplishes hard-to-detect theft by ‘small slices’ e.g. by rounding down interest in accounts by minuscule amounts and depositing these amounts in the accounts of the perpetrator. Let it be supposed again that a hacker by using the scam known as ‘the trapdoor’ gains unauthorised access to computer passwords or the like. These cases of data diddling and computer thefts are not covered by section 188.

It does not matter, whether the document is official or private, secret or public, an original or a copy. What matters is that the thing is a document and was in the custody (actual or constructive) of a public authority at the time it was removed, abstracted, or destroyed.

By section 188(2), “whoever destroys or damages any register, record or other original document of any public authority shall be punished with imprisonment for from 5 to 10 years and with a fine²⁶⁰.” Here the destroyed or damaged document must be an original rather than a copy thereof. The penalty for an offence under this provision is higher than that for a similar conduct under section 188(1).

2.3. Taking copy of any government document

It is an offence to take, without authority or permission, a copy of any document the property of the government²⁶¹. The penalty for the offence is imprisonment for from 1 month to 1 year. It is doubled where the offender is a public servant²⁶².

Taking a copy of any government document is an offence whether or not the taker intended permanently to deprive the government of the document, and irrespective of the type of document involved. In *The People v. Kwab David Annim & Tita Sikod Choh* (1979), the charge was correctly laid when it accused one of two defendants of ‘ordering’ the other defendant “to take without authority a copy of a document, to wit, a petition ... from a file in the Sub Divisional Office ... and thereby committed an offence contrary to and punishable under section 189 as read with section 97(1) of the Penal Code.”

The difference between an offence under section 188(1) and an offence under section 189 should not escape notice. Under the former provision the document is in the *custody* of a public authority, whereas under the latter provision the document is the *property* of the government. In the one case the prosecution need only prove possession, while in the other case ownership

²⁶⁰ From 25 000 to 200 000 francs.

²⁶¹ Section 180.

²⁶² Section 132(2).

must be proved. Furthermore, although the government is a public authority not every public authority is *the* government.

Under section 189 it must be shown that the copy of the document was taken *without authority or permission*. It is thus a defence to show that the accused had authority or permission to take a copy of the document in question. In *David Awemu v. The Commissioner of Police*²⁶³ the appellant, a Police Inspector, during the course of an investigation which he was conducting, made a personal copy of a letter, dealing with the investigation, which was written to the Police by the State of West Cameroon Chief Law Officer. He was charged with, convicted of and sentenced for making a copy of a document the property of the government. The document he was accused of having made a copy of was a letter addressed to the Judicial Police by the Chief Law Officer concerning the investigations into a certain case against one Solomon Pungong, a prosecution witness. The appellant was the officer charged with the investigation into the case against Pungong and the Chief Law Officer's letter was brought to his notice in the due course of his duties. Evidence was adduced in court to the effect that an investigating officer would be entitled to make copies of a letter from the Legal Department if he thinks it necessary for the purpose of helping him in investigations. Dervish J., sitting in the High Court at Buea had no difficulty in holding, setting aside the conviction and sentence, that the appellant, as investigating officer in the case had the right to make a copy of the letter in question and that therefore it cannot be said that he made the copy without authority.

§3. Offences against the normal operation of public service

3.1. Disturbance

Section 185 provides: "Whoever disturbs the operation of any public service to which he does not belong shall be punished with imprisonment for from six days to one month or with fine²⁶⁴."

The crime is committed irrespective of the form of the disturbance. Examples would be a physical obstruction such as blocking the entrance to an office; upsetting an office table; seizing stationery or equipment; assaulting an employee at work; breaking the concentration of an employee at work by, say, shouting, singing, playing music, noisily chatting away or revving the engine of a vehicle parked nearby.

It is a defence to a charge under this section that the accused belongs to the public service the operation of which he is alleged to have disturbed. The policy of the law in allowing this defence is informed by the danger of the possible abusive use of the section. If that defence was unavailable few are the employees who would escape the provision.

²⁶³ (1968) W.C.L.R. 58.

²⁶⁴ From 1 000 to 50 000 francs.

However, the benignity of the law does not mean employees are thereby licensed to disturb the operation of the public service to which they belong. Such disturbance would usually attract some disciplinary or forcible action. Thus, for example, a person who belongs to the department of post and telecommunications and who disturbs the operation of that service may be ordered by an official of that department to leave the office or premises and if he refuses or fails to comply with such request he may be forcibly removed by the person authorized to make the request or, on demand, any member of the police force²⁶⁵.

3.2. Resistance to the carrying out of authorized works

Any person who by assault or threat resists the carrying out of any works lawfully ordered or authorized by public authority is guilty of an offence under section 186.

A person is also guilty of an offence under the same section if he destroys, or conceals, or removes any boundary mark appertaining to any works lawfully ordered or authorized by public authority.

The prescribed penalty for each of these offences is imprisonment for from 3 months to 2 years and with a fine²⁶⁶.

§4. Offences against certain acts of public authority

4.1. Breach of seals

It is an offence to break any seal lawfully affixed whether by court or government order²⁶⁷. The offence is punishable by imprisonment for from 6 months to 2 years and with fine²⁶⁸.

4.2. Defacement of posters

The crime of defacement of poster under s.196 is committed when a person ‘removes, obliterates or defaces’ any judgment ordered by the court to be posted up pursuant to section 33 of the Code²⁶⁹.

4.3. Innkeeper’s register

By section 199, “Any keeper of an inn or common boarding-house, who,

²⁶⁵ Schedule III (B), section 61.

²⁶⁶ From 10 000 to 50 000 francs.

²⁶⁷ Section 191.

²⁶⁸ From 50 000 to 500 000 francs.

²⁶⁹ Decree No.66-DF-513 of 15 October 1966 directs that the display or posting “shall be effected on a special notice board at the entrance of the court making the order” and may include “additional posting in any place or places ... best fitted to ensure the publication ... and in particular at the entrance of the offender’s residence.” As a general rule, only the conclusion and result of the judgment are required to be posted.

contrary to any regulation, does not register, or registers under a false name, any person staying in the said inn or boarding house shall be punished with imprisonment for from 6 days to 3 months, and with a fine²⁷⁰.”

Inns and common boarding houses (nowadays known as guest-house, or lodging house, or motel) are both public houses providing meals and accommodation in return for payment. It used to be the case that an inn would normally be found in the country and would additionally serve drinks. Today there is very little difference between an inn, a boarding house and a hotel. In the hospitality industry these are all considered hotels, although ranked from one to five stars depending on the extent of the facilities and degree of comfort provided by each.

This section targets the professional hotelier rather than the landlord who rents his premises for accommodation.

4.4. Illicit burial

The disposal of the human corpse is regulated by law in a manner consistent with society’s morality and beliefs, out of respect for the deceased and for reasons of public health and hygiene. A dead body must be buried or otherwise legally disposed of within the number of days specified by law.

Section 200 punishes ‘illicit burial’, that is to say, the disposal, by whatever method, of a human corpse otherwise than as prescribed by law or regulation. A person who buries a body in a shallow grave when the law ordains that it should be buried six feet deep may properly be convicted under this section. Similarly the burial of a human corpse without first putting it in a coffin or putting it in a coffin but without hermetically sealing it, as may be required by law would be an offence under this section.

If the law ordains that a human body must be buried only in an officially designated cemetery or graveyard, any burial anywhere else would be an offence. No law in this country requires burial only in a designated cemetery or graveyard. However, the law lays it down, for reasons of public health, that no person shall without the consent of the state bury or attempt to bury any corpse in any house, building, premises, yard, compound, or within a hundred yards of any dwelling house, or within any open space situated within a township²⁷¹. The provision is a dead letter. In this country there are few public cemeteries or communal graveyards, and people generally tend to bury their dead in their yard or premises. By acquiescing in such practice the state may be taken to have tacitly given its consent.

Cremation is an anathema in this country and may be an offence if a mortician or an undertaker does so. Even if the law were to permit cremation it could well insist that cremated remains be not scattered but rather placed in

²⁷⁰ Of from 10.000 to 100.000 francs.

²⁷¹ Schedule III (B), section 59.

a niche in a columbarium or in a box or an urn and buried.

It is common practice to embalm a dead body so as to prevent decomposition while funeral arrangements are being made. But it may be an offence under s.200 to mummify a human corpse and lock it up in a room. Still, an arguable case could be made that since doing so does not amount to burial the question of illicit burial under section 200 hardly arises.

Offences against the Administration of Justice

The judicial process would fail to work properly if people were free to give false evidence in court, challenge the court's dignity and authority, interfere with the proper functioning of the court, defeat or thwart the course of justice. Legal protection of the administration of justice is critical. Undermining the dignity and authority of the court erodes public confidence in and respect for the administration of justice. In the final analysis it is the entire legal order, good governance and the very existence of the state itself that might be at risk.

No section of the Penal Code deals with offences against the administration of justice as such. But chapter IV (entitled 'Public Authority') contains a wide range of offences grouped under the following headings: perversion of justice²⁷², refusal to assist justice²⁷³, disobedience to judicial orders²⁷⁴, and what may appropriately be termed 'defeating the course of justice'²⁷⁵.

Each offence under these headings has its own specific ingredients. However, in a sense, each is merely a different manifestation of conduct that is in fact contempt of court in a general sense. There are in fact many contempt-of-court offences in the Code but which are not called by that name. Only in section 154(a) is there an offence of contempt of court *eo nomine*²⁷⁶.

§1. Perversion of justice

1.1. Perjury and cognate offences

Perjury is committed when a person in any proceeding gives on oath or affirmation false evidence capable of influencing the decision and which false evidence he may no longer alter²⁷⁷.

The deponent. A deponent who gives false evidence in a judicial proceeding whether in his own cause or in that of another person commits perjury. The deponent may not be a party to the suit but is called as a competent witness to give evidence in the case. He may be the accused called as a witness either for the defence or for the prosecution.

There is no legal bar to prosecuting an accused called as a witness and who

²⁷² Sections 164-169.

²⁷³ Sections 171-176.

²⁷⁴ Sections 177-182.

²⁷⁵ Sections 190-198.

²⁷⁶ That provision is concerned only with that species of contempt *ex facie curiae* often described as 'scandalizing the court', that is to say, contumelious words or behaviour against the court.

²⁷⁷ Section 164(1).

gives false evidence. In *R v. Baker*²⁷⁸ it was held that all statements made by a witness as to matters affecting his credit are material. Baker was charged with selling beer without a license. After being sworn he stated that he had never authorized his lawyer to plead guilty to a previous charge of the same nature, and that he had no knowledge that the lawyer had intended to plead guilty on his behalf. In fact he had authorized the lawyer to plead guilty to the previous charge. He was convicted of perjury. It was argued that his false statement was not material since he admitted the previous conviction, and it was irrelevant to the issues pending whether the plea of guilty to the previous charge had been tendered with his consent or not. A case was stated for the opinion of the Court for Crown Cases Reserved. The conviction was affirmed. Lord Russell of Killowen CJ observed that the sole point for consideration was the materiality of the false statement made by the defendant.

He then opined:

“[A]ll false statements, willfully and corruptly made [by a witness whether for the defence or for the prosecution] as to matters which affect his credit, are material. The magistrate may be influenced in arriving at his decision by the circumstances of the previous conviction, and, if the defendant’s solicitor had pleaded guilty on his behalf without his knowledge or consent, that circumstance might have been taken into consideration as affecting the amount of punishment. ... In *R. v. Overton* the date of a receipt which was given for the price of a greyhound was held to be material ... on the ground that every question on cross examination of a witness which goes to his credit is material. ... In *R. v. Lavey*, where a plaintiff in a county court had falsely sworn that she had never been tried at the Old Bailey, and had never been in custody at the Thames Police Station, the evidence was held to be material. This, again, was on the ground that it affected her credit. In *R. v. Gibson* ... it was held that perjury might be assigned on evidence going to the credit of a material witness in a cause although such evidence, being legally inadmissible, ought not to have been received. That is a very strong authority – much stronger than is needed to support the conviction in the present case. I am of opinion that the evidence was material, and the conviction was right and ought to be affirmed.”

In this country, prosecution for perjury is rare but occasionally the odd case does come up. The reason is that where a defendant is convicted of the offence for which he was arrested and where he had committed perjury in the course of the proceeding no separate perjury charge is laid. The court simply takes into account the perjury when passing sentence. Where the accused is acquitted the likelihood of sustaining a perjury charge against him becomes even more difficult. In fact such a charge may be rightly perceived as an oppressive prosecution.

²⁷⁸ [1895] 1 Q.B. 797.

It is probably the case that many witnesses commit perjury and get away with it. The major hurdle to prosecuting alleged perjury cases is that proof of deliberate lying is very difficult. The polygraph or lie detector even in the US where it is sometimes resorted to is not generally considered an appropriate instrument in judicial proceedings on account of its unreliability. In any case, it is not even expedient to try to prosecute every deponent who gives false evidence. Any such attempt would raise practical difficulties, as the courts would be inundated with perjury prosecutions. This is not to say that perjury cannot be proved. It suffices to support a charge of perjury that it can be proved by the evidence of more than one witness that the accused made statements on other occasions which were different from those which he made on oath. It was so held in *R. v. Hook*²⁷⁹. Hook, a policeman, laid an information against a publican for keeping open his public house after the permitted time. He had told the magistrates' clerk that he had observed four men leaving the house after 11 p.m. He had made a similar statement to two other witnesses. He stated on oath at the trial of the information that he did not see any person leaving the house after 11 p.m. on the night in question, and admitted that he had offered to perjure himself in return for a bribe from the publican. The Court for Crown Cases Reserved affirmed his conviction for perjury.

Per Byles J:

"The rule requiring two witnesses to prove perjury reposes on two reasons: first, that it would be unsatisfactory to convict when there is but the oath of one man against the oath of another; secondly, that all witnesses, even the most honest, would be exposed to the peril of indictments for perjury, if the single oath of another man, without any confirmatory evidence, might suffice to convict. But the letter and spirit of the rule, and both the reasons for it, appear to me to be satisfied where, of two distinct admissions of the defendant inconsistent with his innocence, one is proved by one witness, and one by another. It has already been held that the testimony of one witness deposing to the defendant's admission on oath, if there is corroboration, is enough: *R. v. Wheatland*. But if a single witness deposing to an admission of the defendant be one witness within the rule, then another witness, deposing to another admission, must surely be a second witness within the same rule..."

Bramwell B. concurred with this statement of the law:

"[I]f there be two opposing oaths only, you could not properly convict a man of perjury, because the only legitimate conclusion to be drawn is that one was false. But when the oath complained of is sufficiently established, and you have other evidence to show that the oath complained of was not true, then it follows that the oath complained of is a false one."

²⁷⁹ (1858) Dears & B. 606.

The essence of perjury is that the witness has proved false to the oath he has sworn or the affirmation he has made. It therefore follows that if a false statement is not made on oath or affirmation perjury would not lie because there is no oath that has been betrayed. Perjury cannot be assigned to the false statement of a witness not made on oath or affirmation.

Every person is a competent witness in any judicial proceeding²⁸⁰. Nevertheless, if a prospective witness cannot understand the questions put to him by the court, or cannot give material answers to those questions by reason of tender years, extreme old age, disease of the body or mind, or any other cause of the same kind, he is not a competent witness and cannot give evidence on oath²⁸¹. By s.179 of the Evidence Ordinance oral evidence given in any proceeding must be given upon oath or affirmation administered in accordance with the provisions of the Oaths and Affirmation Ordinance²⁸². *Semble*, therefore that perjury will not be assigned on a false statement made under an oath not administered in accordance with the Oath and Affirmation Ordinance.

Any proceeding. In terms of section 164, perjury is committed not only when a false statement on oath or affirmation is made in the course of a judicial proceeding. The section speaks of ‘any proceeding’, clearly indicating that the lawmaker had in mind other proceedings as well. The phrase ‘any proceeding’ must therefore be understood to mean any proceeding in which evidence may be taken on oath or affirmation. The obvious instance of such proceeding is a judicial proceeding (criminal or civil) irrespective of the court in which it is conducted and even if the court in question lacks territorial or subject-matter jurisdiction. Other examples are proceedings at a preliminary inquiry, proceedings in an administrative tribunal, proceedings at a commission of inquiry, and proceedings during police investigations. Provided always that the proceeding is one in which oath or affirmation is administered, and the tribunal administering the same is properly constituted. A person is not guilty of perjury if, having been sworn he knowingly makes a false statement before a tribunal which is not properly constituted²⁸³.

Oath or affirmation. Perjury is committed when the false evidence is given on oath or affirmation (or an admonition to speak the truth, as happens

²⁸⁰ Evidence Ordinance, Cap. 62 of 1958.

²⁸¹ However under the Children and Young Persons’ Ordinance, Cap. 32 of 1958, perjury is assigned to the false evidence of a child even though such evidence may not have been given on oath.

²⁸² Cap. 142 of 1958.

²⁸³ R. v. Lloyd (1887) 19 Q.B.D. 213.

especially in the case of child witnesses) administered as prescribed by law. It is immaterial whether such evidence was given orally or by way of a sworn affidavit. It is equally of no moment whether such evidence took the form of answers to interrogatories in an action, or statements in a document initiating some proceeding such as swearing an information, swearing an affidavit in support of a motion *ex parte* (i.e. without telling the other party), swearing a petition for divorce, and so on.

Where the perjury results from evidence contained in an affidavit or the like, the offence is committed when the deponent takes oath to the truth of the affidavit. It is therefore unnecessary to aver or prove that the affidavit was filed or in any way used; for the gist of the offence is that the deponent has betrayed his oath.

False evidence capable of influencing the decision. Perjury is not assigned to the mere fact that false evidence has been given on oath or affirmation. The essence of perjury is its tendency to mislead the proceeding. That being the case the falsity and the materiality of the evidence must be proved.

First, the evidence, whether testimonial or documentary, must be false. The falsity may be express or implied, which means that the prosecution may rely on an innuendo in the words of the deponent to prove falsity of the statement. It is submitted that what is required here is objective and not subjective falsity; for the section provides that perjury is committed when materially false evidence is given. The question is not whether the deponent intentionally deposed to a fact he knew to be false, because in that case he can always claim unawareness of the falsity of the evidence. The true question is whether he intentionally deposed to a fact that is in itself false. If he gave the evidence believing that it is false but in fact unwittingly told the truth then there is no perjury as there is no false evidence. A prosecution may however lie for attempted perjury. On the other hand if he gave the evidence believing that it is true and the evidence is in fact false, he is guilty of perjury. If the evidence is in itself false it does not matter whether the falsity relates to something the witness swore he saw or heard or did, or to what he swore he thought or knew or remembered or believed.

Second, the false evidence must be material to the ultimate issue to be decided in the proceeding. In the words of the section, the false evidence must be one 'capable of influencing the decision'. An indictment for perjury will fail if the perjury related merely to some peripheral issue or was incapable of having an influence on the decision in the proceeding. A person may tell a white lie about his age; but if this information is incapable of influencing the decision in the proceeding at hand an indictment for perjury will not lie. If the false evidence is wholly foreign from the purpose, or altogether immaterial and neither in any way pertinent to the matter in question, not tending to have any

bearing on conviction or sentence, not tending, in a civil case, to aggravate or extenuate the damages, it cannot amount to perjury because it is wholly idle and insignificant.

Whether the evidence on which perjury is assigned is material is a question of law to be decided by the proceeding in which it is given. Since evidence may be very material and yet not conclusive upon or even directly probative of a fact in issue it is not necessary that the evidence be such as is sufficient, e.g., for the defendant to be convicted on or for the plaintiff to recover upon. And still less is it necessary to consider to what degree the false evidence is material to the issue. It is enough that it is circumstantially material.

Too late to retract. If a person gives false evidence then shortly afterwards retracts his statement, admits that it is false and tells the truth, he will escape liability for perjury. The same applies if the deponent who gives false evidence corrects his statement at the first opportunity and explains that he has been misunderstood, and that he did not intend to give false evidence. The law assigns perjury to a material false statement only when the deponent ‘may no longer alter it’. At a trial, criminal or civil, if a witness has been examined by both sides or if both sides have closed their case any evidence given by the witness may no longer be retracted or altered. A retraction on appeal of a material piece of false evidence given at the court of trial is ineffective and cannot save the deponent from prosecution for perjury.

Perjury by interpreter. By section 164(3), “Any interpreter who in any proceeding distorts the meaning of any words or writing which he is bound to translate shall be punished ... as if he had committed perjury.”

A good many people called to appear in court as witnesses do not speak or understand English, the official language of the country and thus of the court. Such witnesses give their evidence through an interpreter who may or may not be sworn.

Section 164(3) does not require proof that the interpreter be sworn. And it would appear that there is no rule, statutory or at common law, stipulating that an interpreter must be sworn. However, the courts have evolved a salutary rule of practice according to which an interpreter when called to interpret in any court proceeding must first be sworn. Interpreters are therefore invariably sworn although failure to do so is not in itself an illegality inviting rejection of what has been interpreted or quashing of a conviction following a proceeding at which a witness gave evidence through an un-sworn interpreter. For, the person who cannot speak or understand the language of the court has the constitutional right to an interpreter and not to a sworn interpreter.

The offence under section 164(3) is committed when an interpreter in any proceeding distorts the meaning of any words he is bound to interpret or any

writing he is bound to translate. Any distortion of the meaning of any words or any writing suffices. It need not be shown that the distortion was material in any way. The interpreter need not be a professional. But it must be shown that he had a legal obligation to interpret the words or translate the writing. The legal obligation may arise from the fact that he has been sworn, or is the court's official interpreter, or that he has been summoned or appointed by the court to act as interpreter at the proceeding.

Strictly speaking the interpreter does not in fact commit perjury as defined in section 164(1). He commits the offence of distorting the meaning of words he is bound to interpret. But that conduct is a form of lying. It is morally blameworthy on the same footing as perjury is. And for this reason the interpreter who distorts the meaning of words is punished *as if* he had committed perjury itself. It is, of course, a different thing altogether if the distortion of the meaning of words arose from incompetence rather than from any intentional or deliberate attempt to mislead.

Technically there is a difference between an interpreter and a translator. An interpreter is a person who gives a simultaneous spoken translation in one language of words spoken in another.

A translator, on the other hand, is a person who expresses in writing in one language something written in another. Section 164(3) ignores this technical and somewhat tenuous distinction. It treats the word 'interpreter' as meaning the same thing as 'translator', and 'interpret' and 'translate' as having the same meaning.

Punishment. The severity of punishment for perjury, and for the distortion by an interpreter of the meaning of words, depends on the proceeding involved. Further, there is a harsher punishment in the case of a deponent of false evidence bribed to do so.

Perjury or false interpretation committed at a preliminary inquiry where the proceeding ended with an order of discharge is punishable by imprisonment for from 3 months to 1 year and with a fine²⁸⁴. It is punishable, in any proceeding other than criminal, by imprisonment for from 1 to 5 years and with a fine²⁸⁵. Where the deponent had been suborned to give false evidence the penalty for perjury as dictated by the proceeding in question is doubled and any gift received by him confiscated²⁸⁶.

Where the proceeding is a criminal trial the punishment for perjury or false interpretation thereat varies according to the nature of the offence tried at that proceeding. The punishment is as follows²⁸⁷: imprisonment for life if the trial

²⁸⁴ Of from 5 000 to 50 000 francs. Section 164(1)(a) and (3).

²⁸⁵ Of from 10 000 to 500 000 francs. Section 164(1)(c) and (3).

²⁸⁶ Section 164(2).

²⁸⁷ Section 164(1)(b).

was for a felony carrying the death penalty; imprisonment for from 5 to 10 years and with fine²⁸⁸ if the trial was for any other felony; imprisonment for from 1 to 5 years and with fine²⁸⁹ if the trial was for misdemeanour; and imprisonment for from 6 months to 3 years and with fine²⁹⁰.

A person who commits an offence under section 164 cannot be arrested without warrant²⁹¹.

An important local perjury case is *Chiator David v. The People & Lawan Bako* (2007)²⁹². The charge of perjury on which the appellant was convicted by the Bamenda Court of First Instance stated that “Chiator David ... being an accused in [a] criminal suit gave false evidence on oath in court ... capable of influencing the decision in [that] suit and the [charge] was dismissed and thereby committed an offence contrary to and punishable under section 164(1)(a) of the Penal Code.”

There was attached to the charge sheet a civil claim for the sum of 10 000 000 francs. The appellant pleaded not guilty to the charge and denied liability on the civil claim. At the end of the trial appellant was found guilty as charged, sentenced to 6 months’ imprisonment and a fine of 50 000 francs. He was also ordered to pay 3.5 million francs to the civil claimant (Lawan Bako) and 150 000 francs as cost to the State. In allowing the appeal that was entered against this judgment, the learned Justices of Appeal (Nko, Fonjock & Mbeng, JJA, Vice Presidents) made the following important statement of the law in their unanimous judgment delivered by Mbeng, JA.

“The procedure for trying cases of perjury is clearly stipulated in section 274 of the Criminal Procedure Ordinance. It is either by information or summarily. The procedure provides that it is the trial judge or magistrate who initiates the proceedings. If he does not do so and some other person does it the entire proceedings are null and void. This is similar to defamation cases where the proceedings are initiated upon the complaint of the injured party within four months from the commission of the offence. ... In the case now on appeal it is clear that it was the second respondent [Lawan Bako] who lodged the complaint. This is contrary to the provisions of section 274 of the Criminal Procedure Ordinance. ... The Legal Department ought to have complied with the provisions of section 274 of the CPO [and not having done so] the entire proceedings before the lower court were a nullity. ... [T]he sentence passed and the award made for damages were not only harsh or excessive, they were also illegal and had no basis.”

²⁸⁸ Of from 50 000 to 2 million francs.

²⁸⁹ Of from 10 000 to 500 000 francs.

²⁹⁰ Of from 10 000 to 500 000 francs.

²⁹¹ Schedule III (B), s. 43.

²⁹² Bamenda Court of Appeal, No. BCA/MS/10c/2006, unreported.

“It is clear from the evidence that the [appellant] made the utterances during a criminal trial. The Legal Department therefore ought to have properly charged him if they were right to do so under section 164(1)(b) of the Penal Code and not under section 164(1)(a). Having charged the appellant under the wrong section of the law the trial goes to no issue.”

“The prosecution must prove, *inter alia*, that the proceedings ended in a discharge and that the false information influenced the decision of the trial magistrate or judge. The Respondent’s counsel contended that because the Appellant was discharged in one count of the charge one of the ingredients of the offence was proved. The section of the law refers to a discharge in the proceedings: this means a discharge in the entire proceedings and not only on one count.”

“This is one of the offences which under the Evidence Ordinance need corroboration. ... The appellant was charged with perjury. Perjury like contempt under chapter 5 of the Penal Code is one of the offences committed against a public authority such as the courts, the President of the Republic or other dignitaries, the House of Assembly etc. In the explanatory notes to the Penal Code perjury is an offence of perversion of justice. Generally perjury like contempt of court is an offence against the administration of justice.”

“The trial court awarded [Lawal Bako] the sum of 3 500 000 francs without specifying whether it was for perjury or defamation. If it was for defamation this is untenable because Appellant was charged for perjury and if appellant was charged and found guilty of perjury the civil award would have been made in favour of the State and not to an individual. Award in cases such as these are the civil equivalent of the criminal wrong. The question is what tort in the civil law is perjury equivalent to, definitely not defamation.”

“While we agree ... that the defences in section 306(1) of the Penal Code apply to defamation, we do not accept the view that speeches in court are only limited to speeches or addresses made by counsel. This is too myopic a view in our opinion. However ... an accused person who makes a statement in his defence during a trial in open court which appears defamatory or appears to be a lie is privilege as he did so under privilege conditions. It is the prosecution which must prove an accused guilty beyond reasonable doubt. An accused person can say anything for his defence. This cannot be a ground for further prosecution because proceedings in a court are privileged and proceedings comprise statements made by all the parties in court during the trial. It is clear that appellant made the statement complained of during a criminal trial. Section 164(1)(a) concerns all other judicial proceedings while section 164(1)(b) concerns criminal proceedings. We therefore agreed with counsel for appellant that appellant was wrongly charged and convicted.”

Some clarification is called for. The focus of section 164(1) is false evidence capable of influencing the decision and which evidence may no

longer be altered. It is not every false evidence that is caught by the section; it is only the sort of false evidence that is capable of influencing (and not that it actually influenced) the decision and which the witness may no longer alter. There are two situations in which a witness no longer has any opportunity to alter his testimony: where he has given evidence and left the witness box and cannot be recalled; and where the prosecution and the defence have each closed their case. False evidence that is incapable of influencing decision at the proceeding or which is capable of influencing decision but may still be altered is not within the purview of the section.

Paragraph (a) of section 164(1) is relevant where the proceeding terminates in an order of discharge. The proceeding that the lawmaker has in mind here is clearly the preliminary inquiry (or examination) which an examining magistrate conducts in felonious or other complicated cases. Paragraph (b) of section 164(1) by contrast comes into play where the proceeding is a criminal trial; and paragraph (c) of section 164(1) comes into play in the case of “any other proceeding.” The only other proceeding in which evidence is given on oath or affirmation is a civil trial. Section 164(1)(c) therefore refers to a civil trial.

1.2. False expert report

Section 165 makes it an offence for an expert referee to make a false report he may no longer alter. The penalty is double that for perjury. Besides, the court may also impose the forfeitures described in section 30²⁹³.

Presumably the term ‘expert referee’ means the same thing as expert witness who makes an expert report. The term means a person to whom the court refers a question for his opinion. An expert is a person with special skill, technical knowledge or professional qualification whose *opinion* on any matter within his cognizance is admitted in evidence, contrary to the general rule that mere opinions are irrelevant. Examples of experts are doctors, surgeons, lawyers, engineers, arbitrator, mediator, handwriting experts, etc. It is for the court to decide which witness qualifies to be considered an expert. The court is always at liberty, where a case so warrants, to refer any question arising in any cause or matter to an official or special referee for inquiry and report²⁹⁴.

The mere fact that a false report has been made does not, without more, mean that the offence under section 165 has been committed. That offence is consummated only when the false report made may no longer be altered. So long as the expert has not yet submitted the report the possibility of him altering it still remains. However, when the report is submitted to the court he clearly may no longer alter it. From that moment the falsity of the report would attract visitation of section 165.

²⁹³ Section 170.

²⁹⁴ Under sections 72-75 of the Southern Cameroons High Court Law, 1955, this power is only exercisable in a cause or matter other than a criminal proceeding.

Whether a report is false or not is a matter of fact the court of trial will have to determine from the evidence and the surrounding circumstances.

1.3. False oath

A person is guilty of the crime of ‘false oath’ under section 166 if being a party to judicial proceedings other than criminal he swears falsely to any point the truth of which has been committed to his oath. The offence is punishable by imprisonment for from 1 to 5 years and with fine²⁹⁵. The court may also impose the forfeitures described by section 30²⁹⁶.

The offence is one that can only be committed by a party to a civil proceeding because it is only at such a proceeding that one may encounter the peculiar procedure of committing the truth of any point to a party’s oath. This offence appears to have its origin in French law. Its essence is that the offender has proved false to the oath he swore, rather than that he has made a false statement. For, if a statement is a lie its falsity does not depend on the fact of having taken an oath. The caption of the offence, ‘false oath’, is in fact a misnomer. For it is not the oath that is false or fake, but the statement the party makes on a particular matter after he has committed himself on oath to tell the truth regarding that matter.

1.4. Concealment of proceeding

Section 167 lays down a penalty of 6 months to 2 years’ imprisonment and/or a fine²⁹⁷ for “any party to judicial proceedings who keeps his opponent by any false pretence ... ignorant of any step against him.” Upon conviction for this offence the court is empowered under section 170 to impose, in addition to the appropriate principal penalty, the accessory penalty of forfeitures described by s.30.

The expression ‘false pretence’ has the meaning assigned to it by section 318(1)(c), that is to say, influencing a person deceitfully by tricks or by representation or concealment of any matter of fact. By keeping his opponent in ignorance of any procedural step against him that party is in fact perverting the course of justice. It is a tenet of a good system of administration of justice that justice must not only be done but must be seen to be done as well.

1.5. Concealment and fabrication of evidence

Section 168 creates and punishes a number of distinct offences under the general heading ‘concealment and fabrication of evidenced’. The offences are:

(i) Destruction of evidence

²⁹⁵ From 10 000 to 50 000 francs.

²⁹⁶ Section 170.

²⁹⁷ From 20 000 to 1 million francs.

This offence is committed when a person, with intent to influence any *judicial* proceeding, destroys any physical evidence²⁹⁸. The offence requires proof of two mental states: that the destruction was intentional, and that the defendant's intention or motive in destroying the evidence was to influence some judicial proceeding. It is however unnecessary to prove that the conduct allegedly constituting the offence was committed in relation to a specific pending case. It is not even necessary to show that at the time of the defendant's conduct a court case was in fact envisaged by the department of public prosecutions or a private litigant. It is sufficient that the defendant objectively foresaw the possibility of a judicial proceeding and then proceeded to destroy or conceal the evidence with intent to influence the same.

It is also sufficient to show that the defendant was aware or knew that the physical evidence (book, document, object, or other tangible thing of any kind, or even a human being) *might be* (not necessarily *was* or *would be*) required in a judicial proceeding, whether criminal or civil. It is not necessary to show that the evidence destroyed incriminated the defendant; or, in the case of a pending proceeding, that it did not actually influence it; or that in actual fact it was of little relevance or probative value to the case.

(ii) Concealment of evidence

The same considerations as in (i) apply in respect of concealment of evidence. Concealment means to hide; to keep secret; not allowed to be seen. So in a charge alleging 'destroying or concealing' physical evidence it is necessary that the ultimate verdict should be one only of destruction or only of concealment.

In fact, a count alleging 'destroying or concealing' physical evidence contains not a single offence, but involves two distinct alternative offences. Such a charge can therefore be thrown out as being bad for duplicity. In *The People v. Nicholas Che* (1980)²⁹⁹ a policeman, the respondent, threatened a complainant with implicating him in a case if he (the complainant) did not withdraw his complaint against the person he was accusing. The policeman was charged under section 168(1)(b). The statement of offence read: "Concealment and fabrication of evidence contrary to section 168(1)(b) and punishable under section 164(b) as read with section 89 of the Penal Code."

The trial court dismissed the charge and acquitted the accused. The Legal Department appealed. The Bamenda Court of Appeal (Nyo' Wakai, CJ, Mbuagbaw and Anyangwe, JJA) held that the appeal failed and must be dismissed. In the unanimous judgment of the Court delivered by Nyo' Wakai, CJ their Lordships made the following important statement of the law:

"The section provides several ways by which the offence might be committed.

²⁹⁸ Section 168(1)(a).

²⁹⁹ Criminal Appeal, No. BCA/23.c/79, unreported.

These are: (a) by destroying any physical evidence; or (b) by concealing such evidence; or (c) by obstructing the attendance of a witness; or (d) by fabricating the false physical evidence; or (e) by using false evidence; or and finally (f) by misleading a witness. The offence can be committed only by one of these methods. If several methods have been adopted, then these must form several counts of the indictment. By accusing the respondent for both concealing and fabricating evidence the indictment was obviously bad for duplicity; and again in the particulars of the offence the respondent did not know and could not have known whether he was being charged for concealing, fabricating or misleading. When the statement and particulars of the offence are read together and they should be so read, we are moved to hold that the indictment offended against section 152(1) of the Criminal Procedure Ordinance.”

(iii) Obstructing the attendance of a witness at any judicial proceedings

It is an offence for anyone to obstruct the attendance of a witness at any judicial proceeding with intent thereby to influence the said proceeding³⁰⁰. Obstructing the attendance of a witness at any judicial proceedings is a form of constructive concealment of evidence that includes any method by which a witness is physically prevented from attending some *pending judicial proceeding*, thereby hiding evidence from the court. It is of no moment whether the method employed consists of the use of force, artifice, persuasion or inducement.

(iv) Fabricating false evidence

By section 168(1)(b), whoever with intent to influence any judicial proceeding fabricates false *physical evidence* is guilty of an offence. Clearly, the concoction of testimonial evidence does not fall within the purview of this offence. However, on a charge of manufacturing or fabricating false physical evidence it is immaterial whether the judicial proceeding ever took place or whether the evidence was ever used, provided the fabrication was committed with intent to influence a judicial proceeding. If the accused manufactured evidence he believed to be false evidence but which evidence in fact turns out to be true, an attempt would lie.

(v) Using false evidence

Whoever with intent to influence any judicial proceeding uses *false physical evidence* is guilty of an offence under section 168(1)(b).

(vi) Misleading a witness

The offence of misleading a witness with intent to influence any judicial proceeding is also provided for in section 168(1)(b).

³⁰⁰ Section 168(1)(a).

(vii) *Obtaining promise not to report a crime or not to give evidence.*

It is an offence under section 168 (2) for any person to obtain from another person a promise not to report a felony or misdemeanor or a promise not to give evidence. These two offences are further instances of conduct amounting to obstructing or defeating the course of justice. In the latter offence it is immaterial whether the person from whom the promise not to give evidence has been obtained has been subpoenaed or not. It is not an offence to obtain, without resorting to unlawful means (e.g., use of force, threat, gift or promise), from the victim of a misdemeanour or his legal representative a promise not to report the misdemeanour or not to come forward and give evidence at the trial of that offence. It seems therefore that in misdemeanour cases the law encourages *bona fide* compromises, i.e., a compromise without strings attached to it.

An offender under s.168 cannot be arrested without warrant³⁰¹.

Punishment. Any of the above five offences is punishable by the same penalty as that provided for perjury under s.164. The distinction drawn in that section applies, and in passing sentence the court may additionally impose the forfeitures described by section 30.

1.6. Prejudicial comment

The oral or written publication of information or comment regarding a matter that is *sub judice* (before the judge), and in a manner liable to influence the outcome of the case is a form of contempt *ex facie curiae* (out of the sight of the court). Proceedings for this species of contempt may be taken either under the inherent powers possessed by all courts of law to prevent abuse of their procedure under the common law or under section 169(1) of the Penal Code.

That section enacts: “Whoever refers publicly to any judicial proceeding not yet terminated by final judgment in a manner liable to influence, whether intentionally or not, the opinion of any person for or against any party, shall be punished with imprisonment for from 15 days to three months and with fine³⁰².”

Mischief. The mischief aimed at appears to be that of interfering with a fair trial by way of tendentious comments or remarks. Since the conduct amounts to a public injury the rationale of the section is not the vindication of the dignity of the individual judicial officer presiding over the case but the protection of the administration of justice.

‘Refers publicly’. The element of publicity is critical. The impugned comment

³⁰¹ Schedule III (B), s. 43.

³⁰² From 10 000 to 100 000 francs.

must have been made public. Provided the element of publicity can be shown, it is immaterial that the comment was verbal or written, short or long, direct or oblique, a passing reference or a full-blown commentary. It is also immaterial that the comment is contained in a newspaper article, a book, an exhibition, a public address or presentation, a theatrical performance, a song, a handbill circulated or posted up, an Internet posting, or a radio or television broadcast.

‘Pending judicial proceeding’. The prejudicial comment must have been made in relation to a ‘judicial proceeding not yet terminated by a final judgment’. A judicial proceeding is pending as from the moment the proceeding is commenced in court until it has been finally disposed of in the judicial process, which includes disposal in the final possible appeal.

A proceeding remains *sub judice* (i.e. in the course of trial) until judgment has been delivered in the case and the required time for giving notice of appeal has elapsed, or, in the case of an appeal, until the final determination of the appeal. Any publication intended or calculated to prejudice the hearing of a matter on appeal may therefore be the subject of proceedings for prejudicial comment.

Any prejudicial comment about a matter and made before the courts became seised of it or made after a matter has been finally disposed of by the courts, does not constitute an offence under s.169. A retrial becomes a judicial proceeding not yet terminated by final judgment only when, and not before, it has actually been ordered.

‘Manner liable to influence the opinion of any person’. It is not every public reference to, or every public comment on, a pending judicial proceeding that is punishable. Thus, it is not an offence to give an account in good faith of proceedings in open court³⁰³. An account of court proceedings is *bona fide* (i.e. in good faith) if it is fair, moderate, without malice, and made in the public interest (e.g., the interest of the better administration of justice). In an open and democratic society, public debate on matters of law and the administration of justice is vital and necessary for the promotion of public confidence in these subjects. In the words of Lord Atkin, “Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men”³⁰⁴.

Again, privileged statements are not punishable³⁰⁵. These include: statements by MPs in parliament, speeches made and documents produced in court, faithful accounts and without malice of proceedings and speeches in court, publication of any court judgment.

³⁰³ Section 169(2).

³⁰⁴ *Ambard v. AG of Trinidad* [1936] 1 All E.R. 704 at 709, Privy Council.

³⁰⁵ Cf. section 306.

Significantly, the media always report cases of a public interest or cases that excite the interest of the general public, even when such cases may be *sub judice* and the report could have the tendency of influencing the outcome of the case. Trial by the media must of course be deprecated. But in the light of the fundamental human rights to free speech and press freedom, the welcomed tendency is not to prosecute for such publications.

What section 169(1) punishes are public statements or publications made in a manner liable to influence. It makes no difference whether the likelihood to influence was intentional or not. Furthermore, the author of the statement or publication need not be morally blameworthy. Again, it is not necessary that the opinion of another was actually influence. It is sufficient that the publication was ‘in a manner liable to influence’ the opinion of a person. The test is a subjective one. Was the opinion of ‘any person’ liable to be influenced? It is sufficient that the opinion of only one person among several others was liable to be influenced. Whether that opinion be reasonable or not seems irrelevant. However, the opinion that the impugned conduct should be liable to influence must be opinion for or against a party. It is an idle defence to say that the statement or publication complained of did not reach the ears of the court, or that even if it did the court in fact did not believe it or was not influenced by it. It is not only the opinion of the trial judge that matters. The section talks of the opinion of ‘any person’.

Punishment. Prejudicial comment is punished with imprisonment for from 15 days to 3 months and with fine³⁰⁶. Where the offence is committed through the media, whether print or audiovisual (radio/television), the penalty is enhanced and becomes imprisonment for from 3 months to 2 years and a fine³⁰⁷. When passing sentence following a conviction under Section 169 the court may, in addition to the principal penalty pronounced, impose the forfeitures described by section 30³⁰⁸.

§2. Refusal to assist justice

The offences under this head³⁰⁹ are some of the cases in which the law punishes culpable abstentions by laying imperative norms prohibiting abstentions and placing a duty to act positively. The offender is punished because he either refrains from doing something he is legally expected to do or declines or fails to do it, or refuses to answer, or he evades questions on certain matters. What the law punishes is conduct intended to prejudice or obstruct the administration of justice.

³⁰⁶ From 10 000 to 100 000 francs. Section 169 (1).

³⁰⁷ From 10 000 to 5 million francs. Section 169 (3).

³⁰⁸ Section 170.

³⁰⁹ Sections 171-176.

The definition of each offence here is hedged around with such qualifying words as ‘without risk’, ‘being able so to do’, and ‘without just cause’. The reason for the qualification in each case is that criminal liability for mere omission or abstention rather than for active conduct is exceptional³¹⁰.

2.1. Non-intervention

The crime of non-intervention is committed when a person being able so to do by his own immediate action and without risk to himself or to any other person refrains from preventing the commission by any person of a serious offence (i.e., a felony or misdemeanour) against the bodily integrity of another person³¹¹. The impugned conduct smacks of abetment, in this case abetting assault.

By thus placing a legal duty on each individual to prevent the commission of a felonious or other serious assault on another the law goes some way in making everybody their neighbour’s keeper. However, the law does not demand heroism, especially reckless heroism albeit that it does not encourage poltroonery either. Thus, the law holds the accused guilty of the offence of non-intervention only in circumstances where he was (i) able to prevent the commission of the assault³¹², (ii) able so to do by his own immediate action³¹³, and (iii) able so to do without risk to himself or to *any* other person³¹⁴.

It is submitted that the section covers only the case of the person who knows that another designs to commit a serious assault on some other person and refrains from preventing its commission.

The forbearance that the section punishes is confined to refraining from ‘preventing the commission’ and does not include refraining from preventing the continuation of an assault already under way. **A** has a duty to prevent **B** from battering **C**. But it is doubtful that a similar duty lies on **A** to prevent **B** who has already begun battering **C** from continuing to do so.

Admittedly, the actual commission of the assault is the best, though not the only, evidence of intention to commit it. Arguably then, the distinction between non-prevention of the onset of an assault and non-prevention of a

³¹⁰ Section 74 (3).

³¹¹ Section 171.

³¹² A disabled person may thus have a good defence arising from his physical infirmity.

³¹³ For example, by alerting the police or a neighbour or any other person, by facilitating the escape of the would-be victim, by effecting an arrest where a private person may do so, by disarming the would-be assailant in interceptive lawful defence, by preventively assaulting the would-be assailant in exercise of the right to anticipatory or pre-emptive lawful defence consistently with section 84(1) of the Code.

³¹⁴ It is submitted that the risk here covers not just a present risk, but also a future risk provided it is real or very probable and not just a mere possibility or an unreasonable fear. Presumably any type of risk suffices. But whether it includes ‘risk’ of being bewitched or spiritually attacked must be open to doubt.

continuing assault might well be a tenuous one. But if it were the intention of the lawmaker to cover the latter case as well he would have clearly said so. Such cases can be properly prosecuted as failure to assist (section 283) which offence incidentally carries the same penalty as that for non-intervention.

The type of offence that s.171 places a legal duty to prevent is any felony or misdemeanour against bodily integrity such as murder, capital murder, grievous harm, assault occasioning unintended death, assault occasioning unintended grievous harm, simple harm, slight harm, desertion of an incapable, unintended killing and harm, reckless driving causing injury, and so on³¹⁵.

Punishment. The penalty incurred by a person guilty of non-intervention is imprisonment for from 1 month to 3 years and/ or with fine³¹⁶.

Rationale. The interest that this offence seeks to safeguard is law enforcement and the prevention of crime, not the bodily integrity of the person.

2.2. Refusal to clear

“Whoever, being able so to do without incriminating himself, his spouse, or any ascendant or descendant, refrains from communicating to the judicial or police authorities evidence of the innocence of any person in custody awaiting trial for felony or misdemeanour, or notwithstanding that the judgment may not be final, convicted of felony or misdemeanour, shall be punished with imprisonment for from one month to three years or with fine from twenty thousand to one million francs, or with both such imprisonment and fine.”

This is a rather strange offence from the point of view of both principle and draftsmanship. The duty to communicate evidence of the innocence of any person in custody awaiting trial ominously presupposes that the detainee is already presumed guilty. Secondly, if the policy consideration behind this offence is to obviate the possibility of an innocent man being unjustly convicted and jailed then it seems anomalous that the obligation to communicate evidence of innocence should arise only in circumstances where the individual can do so ‘without incriminating himself, his spouse, or any ascendant or descendant’.

Also seemingly anomalous is the fact that collaterals are not included in the enumerated circle of relatives. The result is this somewhat bizarre situation. Someone else is detained for a murder actually committed by me, my spouse, any of my parents, or any of my children. Going by the tenor of section 172 there is no duty on my part to tell the police or judicial authorities that they are holding the wrong person; but there is a duty to do so if I know the actual

³¹⁵ Sections 275-290.

³¹⁶ From 20 000 to 2 million francs.

murderer to be my brother, sister, uncle or aunt.

Of course, it could be that the natural law of self-preservation would prevent a person who has committed an offence from denouncing himself to the police. But it would seem odd that that law could be prayed in aid to shield relatives. Perhaps the attitude of the law is that a man should not be forced to incriminate himself, his child, his spouse, or his parent. If that is the attitude of the law then it is redundant to say so in the definition of the offence under section 172.

In terms of draftsmanship the clause 'notwithstanding that the judgment may not be final' obscures rather than clarifies the alternative offence in the section. The way the alternative offence is drafted makes it look as if the obligation to communicate evidence of the innocence of a person convicted arises in the first place when the judgment has become final and then also even when the judgment is not yet final. One would have thought that the obligation ought to arise only so long as the judgment is not yet final because thereafter the court and the police become *functus officio* and any fresh evidence vindicating innocence of the convict prisoner can only be considered within the framework of the procedure of executive reference³¹⁷.

These imperfections notwithstanding, section 172 clearly creates two alternative offences:

- *Refraining from communicating to the judicial or police authority evidence of the innocence of any person in custody awaiting trial for felony or misdemeanour.*

There is no obligation here to communicate such evidence if the person has not been remanded into custody awaiting trial. Remand into custody awaiting trial is a measure taken by the trial court after the accused has been formally charged. It follows that if the suspect remains at large, is in police custody, or has been granted bail whether by the police or the court there is no obligation to come forward with evidence of his innocence. Nor does the obligation arise in the case of a simple offence, first because of its trivial nature and secondly because remands are never made in respect of such offences.

- *Refraining from communicating to the judicial or police authority evidence of the innocence of any person convicted of felony or misdemeanour.*

Such evidence would enable revisiting the case, vacating the judgment of conviction and expunging the conviction from the criminal record.

In each of these offences the prosecution must also prove that the accused was able so to do, and that he was able so to do without incriminating himself, his spouse, or any ascendant or descendant.

³¹⁷ C Anyangwe, 'Finality and Miscarriage of Justice in Criminal Law: Post-Conviction Remedies in Common and Civil Law Jurisdictions,' 30 *Zambia Law Journal*, 1998, p. 51.

2.3. Defaulting witness

By section 173(1) a person “regularly summoned as a witness in any proceeding” commits an offence if he fails to appear without just cause. He commits another offence if he declines to take oath or to affirm. He commits yet another offence if he declines to give evidence. Each of these three offences is a form of contemptuous behaviour and is punishable by imprisonment for from 6 days to 3 months and with fine³¹⁸.

The term ‘regularly summoned’ does not mean repeatedly, usually or continuously summoned. It means properly or lawfully summoned. The summons must have been properly issued and properly served. Sections 186 and 187 of the Criminal Procedure Ordinance, Cap. 43 deal with ‘issue of summons for witness’ and ‘service of summons on witness’, respectively. These provisions do not deprive the court of its common law power to issue, as a matter of course, a *subpoena ad testificandum* (a witness order or a summons to attend court and give oral evidence) before or at any time during trial.

The proceeding must be a judicial proceeding. As long as it is, it matters not whether it is a criminal or a civil proceeding. A commission of inquiry conducted by a judge under the Commission of Inquiry Ordinance would be a judicial proceeding.

One of the three offences under section 173(1) is refusal to give evidence when regularly summoned as a witness. Here the witness appears in the proceeding, whether or not in answer to a summons, but declines to give evidence. A person in the witness box cannot refuse to be sworn and when sworn cannot decline to be examined, whether in chief, in cross-examination or in re-examination. Unlike an accused, a witness has no right to silence but only the privilege not to answer certain type of questions (vexatious questions, incriminating questions, questions intended merely to annoy or ridicule the witness). If an accused elects to take the witness box and give evidence as a witness on his own behalf he cannot decline to give evidence. He can only exercise his privilege not to answer questions tending to show that he has committed an offence other than that for which he is charged. The trial strategy for an accused wanting to exercise his right to silence is to remain in the witness box throughout the trial.

Section 173(2) punishes “whoever, having publicly referred to a felony or misdemeanour and publicly proclaimed his knowledge of the offender or of his accessories, refuses to answer or evades the question on such point of the judicial or legal officer having jurisdiction.” The subsection creates a single offence and not two distinct alternative offences because to evade answering specific questions is tantamount to a refusal to answer them. The offence may be committed during interrogation by the state prosecutor, during a

³¹⁸ From 1 000 to 50 000 francs.

preliminary inquiry, or during a trial. The penalty for the offence is imprisonment for from 6 days to 1 year and/or fine³¹⁹.

2.4. Defaulting expert

Any person whose assistance has been ‘regularly required’ as expert, medical practitioner or interpreter by any judicial or legal authority and who without just cause declines to furnish it, is guilty of an offence and liable on conviction to a fine³²⁰.

2.5. Defaulting juror or assessor

A person commits an offence if he is summoned as a juror or assessor and he, without just cause, either (i) fails to appear, or (ii) fails to take oath or to affirm as required by law, or (iii) withdraws before the termination of his duties³²¹. The penalty for any of these three offences is imprisonment for from 6 days to 3 months and fine³²².

No legislation empowers courts to hold criminal trials with assessors. There is a permissive provision in the law organizing the courts that merely stipulates that in capital cases on appeal the Appeal Court may sit with three assessors. But this provision is virtually a dead letter. However, in the case of appeals from a military tribunal the Court of Appeal must sit with a soldier as assessor. Appeals from military tribunals are rare.

Assessors are commonly used in labour cases. It is mandatory for any Magistrates’, High or Appeal Court dealing with a labour case to sit with two assessors, one representing employees and the other employers. Furthermore, section 70(1) of the Southern Cameroons High Court Law 1955 provides that “In any civil cause or matter before the High Court, the court may, if it thinks it expedient so to do, call in the aid of one or more assessors specially qualified, and may try and hear the cause or matter wholly or in part with their assistance.”

2.6. False excuse

It is a complete defence to a charge under sections 173, 174, or 175 that the default of the accused was for ‘just cause’. However, if the excuse given in order to escape liability under those sections were to be false, he would have committed an offence under section 176. The crime is denominated ‘false excuse’ and is punished with imprisonment for from 1 to 3 months.

³¹⁹ From 20 000 to 400 000 francs.

³²⁰ From 20 000 to 500 000 francs. Section 174.

³²¹ Section 175.

³²² From 5 000 to 50 000 francs.

§3. Disobedience to judicial orders

Sections 177-182 deal with conduct that may be considered a challenge to the authority and dignity of the court. Ignoring or demeaning a valid court order is also a species of contempt *ex facie curiae*. Sections 177 and 178 punish non-compliance with a specific accessory penalty³²³ and specific preventive measures³²⁴ imposed by the court.

3.1. Banned residence

It is an offence punishable by imprisonment for from 1 month to 1 year for a person to appear in any place from which he has been banned under section 42 of the Code³²⁵. Under that section the special obligation which a court of trial may impose upon a convicted offender include the obligation not to be present without special and temporary permission in specified places, and the obligation to avoid specified places such as bars, racecourses and gaming-houses.

Section 177 also visits with the same penalty any person who moves from any place to which he has been restricted under section 42. That section again empowers the court of trial to impose upon a convicted offender the special obligation to take up residence in one or more specified places. A person so restricted who moves from the place to which he has been confined is guilty of an offence under section 177.

Under section 178 it is an offence for a person: (i) to follow an occupation which has been forbidden him under section 36, or (ii) to re-open any premises closed under section 34, or (iii) to infringe any forfeiture or obligation not covered by section 177 which has been imposed upon him under sections 31, 41 or 42. The penalty for any of these three offences is imprisonment for from 15 days to 6 months and fine³²⁶.

Sections 177 and 178 in effect give teeth to ss.31, 36, 41 and 42.

3.2. Wilful insolvency

Section 181 in effect punishes the judgment debtor who tries to evade his just obligation to pay by contriving to be insolvent. The section provides: "Whoever after the decision of any court, final or otherwise, ordering payment of a sum of money, contrives to be insolvent shall be punished with imprisonment for from one to five years."

In contriving to be insolvent the debtor is in fact trying to render nugatory the court's decision. In order to secure a conviction under this section it is not necessary to prove that the accused actually became insolvent. It is sufficient to

³²³ Closure of establishment (section 34).

³²⁴ Banned occupation (section 36), and post-penal supervision and assistance (sections 41, 42).

³²⁵ Section 177.

³²⁶ From 10 000 to 100 000 francs.

show that he merely *contrived* to be insolvent, that is to say, he stage-managed or deceitfully organized his own insolvency, albeit that he did not pull off the stunt.

3.3. Re-entry on immovable property

Anyone who in disregard of a court order against him for possession of any immovable property retakes possession of that property within three months of the court order is guilty of an offence under section 182. The penalty is imprisonment for from 15 days to 6 months.

Reasoning *a contrario*, it is not an offence for the person to repossess the property in question after three months. The repossession is not an offence probably on the reasoning that the person to whom possession had been awarded, by failing to take possession within three months thereby slept on his right. Equity does not aid the indolent. It aids only the vigilant. The person to whom possession had been awarded has not been vigilant. Seemingly, in the circumstances his only remedy lies in suing civilly for damages.

Be it noted that refusal to vacate premises in defiance of a court order to do so does not fall within the purview of section 182.

3.4. Non-payment of court-ordered maintenance

Section 180(1) provides: “Whoever lets pass two months without paying in full any maintenance which he has been ordered by a court to pay to his spouse, ascendant or descendant, shall be punished with imprisonment for from one month to one year and/or with fine³²⁷.”

There is some connection between section 180 and section 358. Both deal with obligations to close family members. However, the scope of ‘desertion’ which section 358 deals with is wider than ‘maintenance’, which is the focus of s.180. Further, whereas the former is considered a crime against the family the latter is considered an offence to a judicial order and therefore punishable as a form of contempt of court.

Section 182 refers to maintenance ordered by a court of competent jurisdiction. A court that lacks jurisdiction cannot make any binding and enforceable order. The offence is only consummated when two months, from the date of the court order, have elapsed without payment of the maintenance.

The defaulter cannot escape visitation by this section by showing that he had made part payment. The law requires payment to be made *in full*. A part payment, however substantial, will not do. Further, it must be shown that the maintenance was ordered by the court to be paid to the defendant’s spouse, ascendant (i.e., parent) or descendant (i.e., offspring or child). The defendant does not transgress section 180 if he fails to pay any maintenance ordered by a

³²⁷ From 20 000 to 400 000 francs.

court to be paid to a brother, sister, fiancée, or cohabitee³²⁸.

However, provided the person in whose favour the maintenance order was made answers the description of 'descendant' it matters not that he is a legitimate child, an illegitimate child, or an adopted child. Furthermore, the term 'ascendant' is not limited to parents. It includes grandparents and great grandparents.

On a prosecution under section 180(1) the onus is on the defendant to prove that his default in paying the maintenance was not intentional. This shift in the legal burden of proof from the prosecution to the defendant is the result of the rebuttable presumption of guilt in section 180(2). That section stipulates that any default in paying the maintenance "shall be presumed to have been intentional".

As under section 358, it is a credible defence that the default was due to poverty, unemployment, imprisonment, or mental illness. However, inability to pay arising from drunkenness, gambling or other habitual misconduct is no defence.

5. Failure to surrender a minor to the person granted custody

Subsection (1) of section 179 punishes with imprisonment for from 1 month to 1 year and with fine³²⁹, "whoever fails to surrender a minor to the person to whom his custody has been granted by order, whether permanent or temporary, of a court."

This offence punishes the disobedience of the court order granting child custody. It is thus primarily concerned with protecting the effectiveness of that court decision. However, the offence secondarily protects the interest of the child as well since the court, in making a custody order, always regards the child's best interest as the first and paramount consideration.

There are three broad situations involving minors in which the court is empowered to make a custody order. First, in proceedings for divorce, nullity or judicial separation the court has power to make a custody order in respect of any child of the marriage who is still a minor. The court may, mindful of the welfare principle, and if not minded to make a joint custody order or a 'split' order, grant custody to one parent, or to a third party (such as a relative), or even make the minor a ward of the court.

Second, where the parent or guardian of a minor is guilty of child abuse (i.e., cruelty, ill-treatment, molestation or other abuse) the court may grant custody of the minor to a third party. Third, a court trying a 'surrogate motherhood' case must decide which of the two, the surrogate/biological mother or the putative mother, should have custody of the child.

³²⁸ For example, in the USA the court may order payment of what has since become known as 'palimony'.

³²⁹ From 5 000 to 1 million francs.

In any of these situations there is a custodial parent or guardian (i.e., the person to whom the court has granted custody of the minor) and a non-custodial parent or guardian. If the latter fails to surrender the minor to the former, he commits an offence under section 179. 'Fail to surrender' means neglect, or be unable to hand over or relinquish possession. If the non-custodial parent fails to hand over the minor in defiance of the court order, the cause of the failure to do so is immaterial. It makes no difference that he was willing or well disposed to hand over the child. For, the law stipulates only that he should have failed to hand over the child and not that he should have refused to do so.

Furthermore, it is not necessary that the custodial parent or guardian should have, following the court order, made a request for the minor to be handed over. It is sufficient that the court made an order granting custody to a party and that the party having *de facto* control of the minor failed to hand him over. Of course the surrender need not take place on the spot or even on the same day. But it must be made within a reasonable time, say a week. In practice this problem is avoided by the court itself indicating the precise date, day, time and place of surrender. If there is no surrender at the indicated point in time the offence is consummated and remains a continuing crime until such time as the child is surrendered.

It is well to note that the court referred to in the section is any court, whether customary or non-customary. Further, if the offender is a parent whom the court has deprived of parental power he may be sentenced to imprisonment of up to three years³³⁰. Finally, the section does not define the word 'minor'. But the general tenor of the Code provisions would appear to suggest that a minor is a person below 21 years of age³³¹, although there does not appear to be any consistency in the Code in the use of the terms 'minor', 'child', 'infant', 'youth', 'young person', 'adolescent'.

§4. Defeating the course of justice

4.1. Misappropriation of attached property

It is an offence under section 190 to misappropriate, or to destroy or damage any attached or garnished property. The prescribed penalty is imprisonment for from 1 to 5 years and a fine³³².

This offence is analogous to the crime of a debtor stealing his own property charged with the debt³³³. However, under section 190 the offender has lawful possession but not ownership of the property, whereas under section 319 the offender is the owner of the property charged with debt.

³³⁰ Section 179(2).

³³¹ Section 147.

³³² From 50 000 to 1 million francs.

³³³ Section 319(4).

4.2. Facilitating a detainee's relations with an outside party

Section 192 provides: "Whoever contrary to the rules governing the custody of any person lawfully detained facilitates his relations with any outside party, shall be punished with imprisonment for from fifteen days to six months."

It must be shown that the detainee was lawfully detained and that the relations he had with an outside party was facilitated by the accused. The nature of the relations is immaterial: communication, correspondence, visits, 'smuggling' of unauthorized items; provided, of course that the relations are forbidden by the rules and regulations governing custody.

The place of detention also does not matter. The offence is committed whether the detention was at a police station, at a prison, or some other place of custody; or whilst the detainee was permitted to work outside the prison, or whilst he was being transferred from one place of custody to another, or whilst being taken to or from the court.

It is noteworthy that s.192 does not punish the one actually carrying on the relations with an outside party but the one who facilitates the said relations. Here, what in fact is an abetment is being punished as an autonomous offence.

4.3. Escape from lawful custody

Section 193 deals with any escape after a lawful arrest. It applies to any escape made after a lawful arrest has been made and while the arrestee was in the custody of the person who made the arrest, en route to or at the police station or other place for the reception of arrested persons. It also applies to any escape after the arrestee has been lodged in lawful custody whether in a prison, police cell or lock-up. But the section does not apply to flight from justice before arrest.

Generally speaking, escape is where an arrested person gains his liberty before he is delivered by due process of law. In s.193 the term is used in a technical sense to denote the act whereby the prisoner liberates himself without force³³⁴ or with force³³⁵. Where the act of liberating the prisoner is carried out by others it is known as rescue, whether force was used³³⁶ or not³³⁷.

(i) Escape stricto sensus

By section 193(1), "Whoever escapes from lawful custody or who being permitted to work outside prison leaves his place of work without permission" is guilty of an offence.

The philosophy behind this offence is that all persons are bound to submit

³³⁴ Section 193 (1).

³³⁵ Section 193 (3).

³³⁶ Section 193 (3).

³³⁷ Section 193 (2).

themselves to the judgment of the law. Any person who, when lawfully arrested and held in custody frees himself from there is guilty of an offence. It is also an offence for a prisoner to escape from lawful confinement.

The offence under section 193(1) is committed whether the escape occurs while the arrestee is being taken to a place of lawful detention, or while the prisoner is working outside prison with permission to do so. The offence is also committed where the prisoner escapes from prison or any other place of detention, or from hospital, or while in the course of removal in custody from one place to another, or while in the course of being taken to and from the court for the hearing of the case, or when arrested and ordered to go into the Police Charge Office to be formally charged.

In *Godlove Fru Tabong v. The People* (1983)³³⁸ a complaint was made by the Secretary of the Ndop Area Co-operative Union that appellant had not accounted for 36 sprayers entrusted to him for distribution to farmers. The appellant vanished for one year and could not be traced. He was finally traced by a police officer. The officer informed him he was taking him to the Police Station in connection with allegations of theft made against him by the Ndop Union. Both went to the Station in a vehicle. At the Station appellant was instructed to go into the Charge Office. He obeyed but soon decided to escape. As he ran along the corridor of the building the police officer called out aloud that the appellant should be stopped in his attempt to escape. Appellant did succeed in escaping but was later re-arrested and brought back to the Police Station. He was detained and subsequently charged with escape from lawful custody under section 193(1) of the Penal Code. The trial court found him guilty. He appealed.

One of the grounds of appeal argued before the Bamenda Court of Appeal (Nyo' Wakai, CJ, Anyangwe and Arrey, JJA) was that appellant had never been arrested and therefore could not be said to have been in lawful custody and from which he could be said to have escaped. After a careful examination of the evidence and perusal of the law the Court in its unanimous decision delivered by Anyangwe, JA came to the conclusion that the appellant had submitted himself to the policeman's custody and had thus been properly arrested and was therefore in lawful custody when he escaped. The Court quoted with approval the following principle of law enunciated in *Alderson v. Booth*³³⁹: "There is no longer any need for an actual seizing or touching to constitute an arrest. There may be an arrest by mere words by saying 'I arrest you' without any touching provided the accused submits and goes with the officer. An arrest is constituted when any form of words is used which, in the circumstances of the case, is calculated to bring to the accused person's notice that he is under compulsion, and he thereafter submits to the compulsion. It

³³⁸ Criminal Appeal No. BCA/36.c/82, unreported.

³³⁹ (1969) 2 QB 216.

all depends on the circumstances of any particular case whether in fact it has been shown that a man has been arrested. No formula will suit every case.”

The appeal in the *Tabong* case however succeeded on the ground of some procedural impropriety on the part of the trial court that gave the distinct impression of bias against the appellant.

It is immaterial how an escape occurred. The accused may not have used any force at all, as where he carried out his purpose by tricks, disguise, or other artifice. Thus a prisoner is guilty of escape if he goes out of his place of lawful detention by licence of the keeper or custodian, without any obstruction, the doors being open by the consent or negligence of the jailer; or if after his place of lawful detention has been broken by others, without his consent or procurement and he frees himself through the breach so made.

The punishment for escape without the use of any force is imprisonment for from 3 months to 1 year. This punishment is less severe than that for ‘negligent escape’ under section 139(4) where the penalty is imprisonment for from 2 months to 2 years. Section 139(4) provides that ‘any custodian who by negligence permits escape’ from lawful custody commits an offence. If the door of a Black Maria, or of a police cell, or of a prison is left open, or if it is not well secured through carelessness, and the prisoner escapes, the custodian is guilty of negligently permitting escape for failure to be vigilant. The same is true where the prisoner cheats the law by killing, hanging or drowning himself, the custodian failing to be vigilant. Once the prisoner has escaped the crime of ‘negligent escape’ is consummated and it makes no difference that the escapee is retaken afterwards.

More often than not prisoners escape using force. Forcible escape is known in some jurisdictions as ‘prison breaking’ or ‘breach of prison’. The force used must be actual physical force, not constructive or psychic force. Provided the force is actual physical force, its extent is immaterial. Nor is it material whether the force was exerted on a person (arresting officer, custodian, prison guard, another prison inmate, an innocent person taken hostage) or on property (breaking open a door or window, breach on a wall, digging a man-hole, setting fire on the building, ripping off ceiling boards or roofing sheets). But the use of force must be by the prisoner himself.

The penalty for escape with the aid of force used to the person or to property is imprisonment for from 1 to 5 years. Where arms were used in making the escape the penalty is imprisonment for from 5 to 10 years.

The law of escape is concerned only with escapes from lawful custody: the arrest must be lawful and the detention must be lawful. The detainee may go at large if he was arrested or detained by irregular process. An officer having the custody of a prisoner under such irregular circumstances commits no offence if he gives the prisoner his liberty with intent to save him from an irregular detention.

The prosecution must also prove that the lawful detention was continuing at the time of the escape. If a detainee is held in police custody beyond the legally permissible period for such custody or if a prisoner continues to be held in prison after he has served his term the custody in either case is no longer lawful and any escape from there does not constitute an offence.

(ii) Rescue

Rescue is the offence of freeing another, whether forcibly or not, from arrest, detention or imprisonment. It is an offence under section 193(2) to rescue any person from lawful custody. Non-forcible rescue carries the same penalty as for forcible escape.

It is worthy of note that the law is indifferent as to whether or not the rescue was through the prisoner's procurement or with his privy or consent. Furthermore, where the escape or rescue is that of a person in custody charged with felony or that of a person who has been sentenced to loss of liberty for more than 10 years the punishment is imprisonment for from 5 to 10 years³⁴⁰.

4.4. Accessory after the fact by shelter

An accessory after the fact by shelter is a person who, knowing that another has committed a felony or a misdemeanour nevertheless shelters that person³⁴¹. The conduct is an obstruction *par excellence* of the course of justice. By section 194 (1), an accessory after the fact to felony or misdemeanour by shelter of the offender, whether convicted or not, is punishable by imprisonment for from 2 months to 2 years. Where the principal offender is punishable by death, the accessory is punished with imprisonment for from 2 to 10 years³⁴².

The offence is committed whether the person sheltered has been convicted or not. If a man shelters another from arrest, investigation, or lawful custody he can properly be convicted of accessory after the fact by shelter.

If the person sheltered is a spouse that fact is a complete defence to a charge of accessory after the fact by shelter³⁴³. The reasoning of the law is that spouses have a marital obligation to cohabit.

There may be available to a principal offender a defence absolving him from responsibility for the offence he is alleged to have committed. If he has not yet been acquitted following a successful plea of that defence, the accessory cannot avail himself of the said defence³⁴⁴.

³⁴⁰ Section 193(4).

³⁴¹ Section 100.

³⁴² Section 194(2).

³⁴³ Section 100(2).

³⁴⁴ Section 194(3).

4.5. Public invitation for contributions to pay off a court fine

“Whoever publicly invites subscriptions for the purpose of indemnifying any person against any pecuniary sentence passed on him by a criminal court shall be punished with imprisonment for from fifteen days to six months and/or a fine³⁴⁵”.

The purpose of this offence appears to be to safeguard the deterrent effect of any sentence to a fine passed by a criminal court. ‘Indemnify’ means to compensate, to reimburse. A person may not publicly call for contributions to enable an offender to be reimbursed a fine imposed on and paid by him in consequence of his conviction. Such conduct would seem to suggest that the person was unjustly convicted and fined. This in effect means questioning the integrity of the court.

The section 195-offence is committed only where there is a *public invitation for subscriptions for the purpose of indemnifying* a person against a pecuniary sentence. The offence is consummated as soon as there has been a public *invitation* for that specific purpose; the prosecution need not show that subscriptions were actually made. The invitation must have been *public*. A private contribution of funds by family members and/ or friends to pay off a fine imposed by the court is not an offence. Furthermore, the pecuniary sentence must have been passed by a *criminal court*. It is thus not an offence to publicly invite subscriptions for the purpose of indemnifying any person against damages he has been ordered by a civil court to pay.

4.6. Defacement of copy of judgment posted on a notice board

Section 33 of the Code provides that where the court may order publication of its judgment, the said judgment shall be posted up on a special notice board at the entrance of the court for up to 2 months in the case of a conviction for felony or misdemeanour, or for up to 15 days in the case of a conviction for a simple offence. By s.196 any person who removes the judgment so posted up is guilty of an offence. A person who obliterates or defaces any such notice is also guilty of an offence under the same section. The penalty for any such conduct is imprisonment for from 15 days to 6 months and/or fine³⁴⁶.

4.7. Revenge on witness

There are two distinct types of conduct section 197 punishes as ‘revenge on witness’, namely, committing contempt of a witness³⁴⁷, and causing loss to a witness³⁴⁸, by reason of the evidence which he has given.

³⁴⁵ From 20 000 to 10 million. Section 195.

³⁴⁶ From 5 000 to 50 000 francs.

³⁴⁷ Section 197(a)

³⁴⁸ Section 197(b)

Contempt is any defamation, abuse or threat publicly uttered³⁴⁹. Where the particulars in a charge for 'contempt of witness' state that the witness has been defamed, truth can be pleaded and the success of the plea is a complete defence. Either offence under section 197 must have been committed by reason of the evidence the witness gave at a trial involving the accused. If the prosecution cannot establish any such nexus, the charge must fail. Each of the offences under the section carries a penalty of imprisonment of from 10 days to 1 year and/or fine³⁵⁰.

4.8. Forbidden publications

Section 198 lists certain types of proceedings or deliberations publication of any of which is forbidden under pain of punishment by fine. It is an offence to publish:

Any record of any proceeding of a court or of the department of public prosecutions in respect of felony or misdemeanour before it has been read out in open court³⁵¹.

- Any account of proceedings in camera or in any juvenile court³⁵².
- Any deliberations in chambers by any court³⁵³.
- Any conviction of a minor mentioning any particular allowing of his identification³⁵⁴.
- Any information on the proceedings of a parliamentary subcommittee before their report has been laid on the table of the House, except a communiqué issued by the subcommittee's officers³⁵⁵.
- Any information on the proceedings of the Judicial Council, except a communiqué issued by the chair or vice chair of the Council³⁵⁶.

By section 198(4) it is also an offence punishable by fine³⁵⁷ for any person, in courtroom or during court proceedings, to (i) make any sound recording, or (ii) take any photograph whatever, by means of any camera, cinematographic or television process.

³⁴⁹ Section 152(1)

³⁵⁰ From 10 000 to 200 000 francs

³⁵¹ The penalty for this offence is a fine of from 10 000 to 500 000 francs. If publication is through the media the penalty is fine of from 20 000 to 1 million francs. Section 198(1)(a)(3).

³⁵² The penalty is the same as that provided for the preceding offence.

³⁵³ The penalty is fine of from 10 000 to 3 million francs (section 198(2)); and fine of from 20 000 to 6 million francs where publication is through the media (section 19(3)).

³⁵⁴ The penalty here is fine of from 10 000 to 500 000 francs (section 198(1)(c), and from 20 000 to 1 million francs where publication is through the media.

³⁵⁵ The penalty is the same as that for the preceding offence.

³⁵⁶ The penalty is the same as that for the preceding offence.

³⁵⁷ From 10 000 to 3 million francs.

Offences against State Guarantees

The offences under this chapter deal with conduct that undermines public trust in the authenticity of official documents (forgery) and in the national currency (counterfeiting). They also deal with conduct detrimental to the national economy, and with the fraudulent assumption of certain public attributes (usurpation).

All these offences have a close affinity with offences of deception. In fact forgery and related crimes penalise overt preparations for deception involving false documents or other instruments. Similarly, counterfeiting offences and offences relating to the usurpation of power, authority, qualification, or title, are also cases of overt preparations for deception.

Generally, the law does not punish mere preparation for crime. But there are isolated exceptions, of which the offences considered in this chapter are some. The justification for these exceptions is the social and commercial necessity that documents and other instruments, which are relied on are authentic.

§1. Forgery crimes

Sections 201-207 and 209 contain various specific offences of forgery. But the basic concept of forgery is not defined. In each of the forgery offences the terms ‘forges or alters’, ‘makes use of’, and ‘document’ are used, but without any specific meaning being assigned to them for purposes of the law of forgery. These terms therefore call for some elucidation.

Forge or alter. Forgery of a document may be committed by way of alteration of some particular that is originally there in the document. Alteration (or falsification) is only one of several ways by which a forgery may be committed. It presupposes that but for the alterations made on it the document is otherwise genuine.

In ordinary English, to forge means to make or write in fraudulent imitation. It is forgery to make a document purporting to be made by a person who did not exist or did not make it or did not authorise it to be made. It is also forgery to tamper with a document by making some material alteration, addition, erasure or obliteration. A person who makes a document that purports to be made by another person who did not make it, in whatever language it is expressed, in order that it may be used as genuine, commits forgery. He commits forgery because he has made a fraudulent representation

that such a document is true, as it appears on the face of it. In *R. v. Riley*³⁵⁸ it was held that a telegram is an instrument, so that its falsification at the time of dispatch may make it a forgery. Riley was convicted of obtaining money from a firm of bookmakers by means of a forged instrument. He was a clerk in the telegraph department of the post office in Manchester. Having obtained permission from one Barber to place bets in his name, he sent a telegram to the bookmakers placing a bet on the winner of a race which had already taken place. He falsely stated on the telegram form that it had been handed in before the time of the race. His conviction was affirmed on appeal.

Wills J said, "It was a writing which, if accepted and acted upon, would establish a business relation and lead directly to business dealings with another person. It is true that the dealings were of such a nature that they lead to no legal rights, and could not be made the foundation of an action; but they were not forbidden by law, and in that sense and to that extent were legitimate. A post office telegram is issued by a public department in the course of business, and in the present case the telegram appears to me to have sufficient formality, both in its origin and in the use to which it was put, to deserve the name of an 'instrument'."

Forgery may also be committed by fabrication of a non-existent document (as distinct from the alteration or fraudulent imitation of an existing genuine document) and passing it off as truly made by the person whose name and/or signature it bears. The document must thus be false in itself; that is, tell a lie about itself, otherwise there is no forgery. It was held in *R. v. Martin*³⁵⁹ that in a forgery the instrument in question must be false in itself, and that if a person gives a cheque entirely as his own his signing it with a fictitious name will not make it a forgery. Robert Martin bought a pony and carriage from Lee, who knew him very well. He drew and handed to Lee a cheque which he signed 'William Martin'. His account at the bank upon which he drew the cheque was closed and the cheque was dishonoured. Martin was convicted of forgery and his conviction was quashed on appeal.

Per Cockburn CJ: "The case is concluded by authority. In *Dunn's Case* it was agreed by the judges that 'in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that if a person gives a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third party.' Upon authority, as well as upon principle, it is clear that this conviction should be quashed."

In *R. v. Dodge and Harris*³⁶⁰, decided along the line of *Martin*, it was held that documents which do not lie about themselves are not false. Harris

³⁵⁸ [1896] 1 Q.B. 309.

³⁵⁹ (1879) 5 Q.B.D. 34.

³⁶⁰ [1971] 2 All ER 1523.

induced Gold to lend him money by falsely telling him that he was expecting a legacy of £24,000. On Gold's discovering this to be false, Harris told him that Dodge owed him that amount and he showed him two bonds for sums amounting to £10,000 signed by Dodge. Dodge, who did not owe money to Harris, had signed them only to reassure Gold. The conviction of Dodge and Harris for forgery was allowed on appeal. There was a lie as to the intention of the parties to implement the document, but no lie as to the document itself.

Thus to constitute forgery the instrument itself must be false. It is forgery to falsely make an instrument purporting to be that which it is not. An alteration may be a forgery but not every forgery is an alteration. Consequently, although the relevant offences speak of 'forging or altering', those words do not indicate a single offence but two distinct alternative offences.

The forgery of a forgeable document is complete when the document is 'made', though it is never uttered, i.e. published or used. However, telling a lie (i.e. making a false statement) does not become a forgery on account of the fact that the lie is reduced to writing. To be false a document must tell a lie about itself and it must tell a lie about itself by purporting to have been made or altered by (or on the authority of) a person who did not make or alter it (or authorised its making or alteration), or by otherwise purporting to be made or altered in circumstances in which it was not made or altered. This is sometimes described as the requirement of automendacity. The requirement may be illustrated with English cases³⁶¹.

In *More*³⁶² D intercepted a cheque for V. He opened a building society account in a false name and paid in the cheque. Later, he presented a withdrawal form for most of the amount paid in and was paid by the building society. The withdrawal form was, of course, completed in the assumed name of V. D was convicted of the forgery of the withdrawal form. He appealed unsuccessfully to the Court of Appeal. The Court held that the form was a false instrument since it purported to have been made by an existing person who did not exist. D went on further appeal to the House of Lords. The House allowed the appeal, holding that the form was not a false instrument because D was a real person. It was he who was the holder of the account and in that capacity he had signed the withdrawal form. That form clearly purported to be signed by the person who originally opened the account and in this respect it was wholly accurate. In the opinion of the House of Lords therefore the withdrawal form did not tell a lie about itself and was therefore not a false instrument.

In *Warneford and Gibbs*³⁶³ D and E were charged with using a false

³⁶¹ R Card, *Criminal Law*, Butterworths, London, 1995, pp. 353-355.

³⁶² [1987] 3 All ER 825.

³⁶³ [1994] Crim LR 753.

instrument. The alleged false instrument was ‘a purported employer’s reference’, given to a building society in support of a mortgage application, relating to a person who had never been employed by the establishment in question. The prosecution’s case was that the reference was a false instrument because the fact that the person had never been employed by the establishment was a circumstance in which the document on its face purported to have been made but was not in truth so made. The Court of Appeal allowed D and E’s appeal against conviction. It held that the lie in a document had to relate to the actual circumstances of the document’s making, and that a lie about other facts extraneous to the document did not suffice.

In *Donnelly*³⁶⁴, D was the manager of a jeweller’s shop. He completed and signed what purported to be a written valuation of jewellery for insurance purposes. The certificate stated that D had examined the items in question. In fact, the items of jewellery did not exist. The valuation was intended to be used to defraud the insurance company. D was convicted of forgery and appealed to the Court of Appeal, which dismissed the appeal. The Court of Appeal reasoned that the valuation certificate, the instrument in question, told a lie about itself because it purported to be made in circumstances in which it was not made.

In *Jeraj*³⁶⁵, D was a bank manager. He signed a document on bank notepaper to the effect that he had received a certain letter of credit and that, on behalf of his bank, he had fully endorsed it. In fact, the letter of credit did not exist. He could therefore not have received or endorsed it. The Court of Appeal dismissed D’s conviction for forgery. The Court held that the document (signed on the bank notepaper) was false. In its view, since the letter of credit had never existed, the document had not been made after the letter had been received and endorsed. The document therefore purported to have been made in circumstances in which it was not made. The Court pointed out that D’s document was such as to represent that it, together with the letter of credit, amounted to some kind of articulated document, the letter of credit being subject to an endorsement, by reason of the document which was to be read with it. The document thus told a lie about itself because it could not be an endorsement of a non-existent letter of credit.

The status of *Donnelly* and *Jeraj* in the light of s. 9(1) of the English Forgery and Counterfeiting Act 1981 would seem uncertain. Card³⁶⁶ argues that they are clearly in conflict with *More* and *Warneford & Gibbs*, which, he submits, are clearly in line with the requirements of s. 9(1). In this country, however, it would be surprising if the facts in *Donnelly* and *Jeraj* would be decided differently from the decision arrived at by the Court of Appeal in England.

³⁶⁴ [1984] 1 WLR 1017.

³⁶⁵ [1994] Crim LR 595.

³⁶⁶ *Criminal Law*, op. cit.

A document is falsified if it is a spurious imitation of a genuine document that exists (i.e., it is an entirely fake document), or if it is false even only in part (as where a forger inserts the words ‘passed with distinction’ in a certificate which is in all other respects authentic), or if it purports to have been made by or on behalf of someone who in fact did not make it nor authorised its making (as where a licence or a certificate is fraudulently signed *per pro* another by an impostor), or if it contains information (e.g., figures, dates, time, place, words) which it did not originally contain, or if it bears a false signature or identification mark (e.g., thumb or other finger impression, big toe or other toe impression, palm impression), or if it bears a false time or place of making. Falsification may thus include alteration.

In *R. v. Ritson*³⁶⁷ Blackburn J held that when an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with a fraudulent intent, it is a forgery at common law. In that case the defendant owned land, upon the security of which he borrowed more than £730 from the complainant. He later executed a deed of assignment for the benefit of his creditors under the Bankruptcy Act 1881. Because the amount due to the prosecutor was greater than the value of the land it was conveyed to him. Defendant then executed a deed of assignment of the land to his son and dated the deed prior to that by which the land had been conveyed to the complainant. He was charged and convicted of forgery. The conviction was affirmed on appeal.

The law of forgery is indifferent as to the various ways by which falsification can be achieved. It matters not whether it is by alteration, erasure, substitution, expunging, expurgation, obliteration, or addition of particulars in the document (e.g., the falsification of accounts of public money), or by endorsement, or by signing in the name of a fictitious person, or by signing in an assumed name and capacity as the signature and capacity of another person, or by making a Photostat copy of an original or forged document and pretending that the Photostat copy is the original.

There is no requirement in any of the forgery offences that forgery is indictable only when it causes prejudice, actual or potential. The offence is complete when the document is forged, and it is immaterial that the forged document is not used or acted upon or that it is clumsy and ineffectual or is incomplete or does not purport to be a document which would be binding in law for any particular purpose. In *The People v. Fongum Gorji-Dinka, Albert Mukong & 11 Others* (1982), Mbuagbaw, J said, “It is sufficient to prove an intention to deceive without there being necessarily an intention to defraud. The offence of forgery may be complete without any publication or uttering of the forged instrument.” Furthermore, in the contemplation of law the mere

³⁶⁷ (1869) L.R.1 C.C.R. 200.

forgery of a document automatically implies prejudice, for every forgery is at least potentially prejudicial to society. Again, there is no requirement that the alteration or addition, calculated to disarm suspicion, be a material alteration or addition.

Makes use of. It is an offence incurring the same punishment as for forgery to make use of a forged document. The expression ‘makes use of’ bears the same meaning as the term ‘utter’ found in the forgery offences of other jurisdictions. A person makes use of a forged document if he offers it, passes it off or delivers it, communicates it, to another or deals with it or acts upon it or makes use of it in some or other way. If the person who thus makes use of the forged document is the self-same person who forged it, he is guilty of two offences, forgery and making use of a forged document. But if he is not the forger he is guilty only of one offence, making use of a forged document. Where the document is genuine, making a dishonest use of it (without having improperly obtained it) is conduct beyond the reach of the law of forgery. Once a forged document is uttered, it is no answer to a charge of making use of a forged or altered document to aver that the person to whom it was uttered was not misled or deceived. The law punishes not just forgery but making use of a forged document or a genuine document improperly procured.

Document. It is clear from a reading of the forgery offences that the term ‘document’ is given a broad meaning. A document is something (paper, metal, stone, wood, bark, skin, parchment, rubber, etc.) on which things are written, printed or inscribed on a permanent basis and which conveys information or records a promise. In short, it is any writing, recording or marking capable of being read or understood by people or machines.

It would seem, on the persuasive authority of old English cases, that a picture or wrapping paper is not a document. In *Closs*³⁶⁸ a picture falsely bearing the signature of a well-known artist was held not to be a document. And in *Smith*³⁶⁹ it was held that wrappers made in the same distinctive form as those in which a particular brand of baking powder was sold were not documents. It follows that a picture or painting (even if purporting to bear the signature of an artist), a false autograph, and any writing or manufactured article indicating the name of the manufacturer or the country of its origin, are not documents.

Examples of documents in the Code are seals, stamps, punches, licences, identification cards, certificates, acts of constituent bodies, forms, private stationery, letters, title deeds, wills, cheques, etc. A seal, stamp, mark or punch is forged if it is made without lawful authority and is in such a form as to be

³⁶⁸ (1857) Dears & B. 460.

³⁶⁹ (1858) Dears & B. 566.

capable of producing impressions resembling those produced by a genuine seal, stamp, mark or punch.

The courts in this country have not yet been but will soon be confronted with cases involving electronic recording. Such recording includes microfilm records of bank accounts and transactions, information on computer discs, any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means.

Whether an electronic recording is a document for the purpose of the law of forgery is a point that has not yet been decided by the courts. It is a document in the law of evidence, and on principle there is no persuasive reason why it should not be a document in the law of forgery.

Intention. In every case it must be proved that the forgery or the alteration was intentional. The offence is complete as soon as the document, instrument or object is intentionally forged or altered. The purpose or motive for the forgery or alteration is immaterial. It is not a requirement of the offence that the forgery or alteration should have been made with intent to defraud or to deceive, although that is always the objective of the forgery or alteration. Thus a man is guilty of forgery if he fabricates a letter so as to puff himself up in the opinion of others, such as producing a letter purporting to be from a famous person inviting him to dinner, and saying, "See what a respectable and well-connected person I am." A man is likewise guilty of forgery if he should falsify a birth or marriage registration so as to make himself appear to be descended from a famous family, for the sake of his own glorification.

Sentence The court when imposing a sentence following a conviction for an offence under sections 204, 205 (2), 206-210, 211 (3)(4), 212 and 213 may also impose the forfeitures described in s.30 and must order confiscation under s.35³⁷⁰. The court would do well to bear in mind also that the punishment for an offence under sections 206 and 207 is doubled where the offender is a public servant.

1.1. Forging the Great Seal

What is termed the 'Great Seal' refers to the seal of the State, the word 'great' being used probably to distinguish that seal from others such as the seal of an institution, a company or an individual (such as a signet). Such seals are used as a method of expressing consent to a written instrument by attaching to it either wax impressed with a device, or now, more commonly, a paper seal (affixed by embossment or by using a wet or dry stamp). For example, an individual may use a seal for the valid execution of an instrument as a deed; a

³⁷⁰ Section 214.

company may execute a document by the affixing of its common seal.

In France and other French-speaking countries, the ‘Great Seal’ is the State seal used for sealing official instruments originating directly from the Head of State. It is used as a way of guaranteeing the authenticity of the instrument in question. That Seal is kept under lock and key in the Ministry of Justice, and for that reason the Minister in charge of that department of government is there styled as ‘Minister of Justice, Keeper of the Seal’.

It is a felony punishable by life imprisonment for anyone to forge the Great Seal³⁷¹. It is also a felony, incurring a like penalty, to make use of a forged Great Seal³⁷². It is again a felonious offence, but incurring the comparatively milder penalty of 10 to 20 years imprisonment, for anyone to make use of the Great Seal improperly procured³⁷³. An example would be where a person makes use of the Great Seal procured by theft, false pretences, tricks, misrepresentation or other artifice.

1.2. Forging treasury security

By section 202 any person who forges or alters any security issued by the public treasury under its stamp or mark, is guilty of a felony and liable to imprisonment for life. A person also commits a felony, incurring a like punishment, if he makes use of any such forged or altered security³⁷⁴.

These offences are committed only when the security was issued by the public treasury and under its stamp or mark. The stamp or mark authenticates the security as having been issued by that body. ‘Public treasury’ refers to the Treasury, that is to say, the government department that controls public revenue. ‘Security’ refers to guarantee for money lent to government. This takes the form of government securities, which are documents or certificates showing who owns stocks, bonds, shares, treasury bills, etc.

1.3. Forging certain signatures, stamps and punches

Section 203 creates and punishes with imprisonment for from 10 to 20 years several distinct offences. The offences are infelicitously drafted but are here presented in a simple and sensible manner. In these offences, the ‘or’, whenever it is used, is disjunctive; so that the indictment cannot allege ‘forging or altering’ in one count, and the particulars of the offence cannot in general terms talk of ‘gold or silver’ or of ‘document or object’ but must specify which is which.

- *Forging or altering the signature of the republican President;*

³⁷¹ Section 201(1).

³⁷² Section 201(1).

³⁷³ Section 201(2).

³⁷⁴ Section 202.

- *Forging or altering the signature of any government minister;*
- *Forging or altering any government stamp.* A ‘government stamp’ is an instrument, usually a rubber stamp, on which are cut a design of the official seal and the name of the appropriate government department or agency, together with the capacity of the relevant authority³⁷⁵. It is used for marking a document or other object so as to authenticate it or to invest it with an official character.
- *Forging or altering any punch for hallmarking gold or silver.* ‘Punch’ is the machine or instrument used for impressing a hallmark in gold or silver. The hallmark indicates the standard of the gold or the silver, as the case may be.
- *Making use of a forged government stamp;*
- *Making use of a forged punch for hallmarking gold or silver;*
- *Making use of any document or object bearing the forged or altered signature of the republican President;*
- *Making use of any document or object bearing the forged or altered signature of any government minister.* In *The People v. Fongum Gorji-Dinka, Albert Mukong & 11 Others* (1982)³⁷⁶ one of the seven counts on which Mbuagbaw, J sitting at the Buea High Court convicted the 1st defendant stated that he made use of a forged document contrary to section 203 (2) of the Penal Code in that he made use of a fake presidential decree bearing the forged signature of X, Secretary General in the office of the President. Another count on which the 1st defendant was also convicted stated that he made use of a fake ministerial order bearing the forged signature of Y, Minister of Territorial Administration.
- *Making use of any document or object bearing the forged or altered stamp or mark of the republican President;*
- *Making use of any document or object bearing the forged or altered stamp or mark of any government minister;*
- *Making use of any genuine but improperly procured government stamp;*
- *Making use of any genuine but improperly procured punch for hallmarking silver or gold.*
- *Making use of any document or object, which though bearing the genuine signature of the republican President, was improperly procured.*
- *Making use of any document or object, which though bearing the genuine signature of any government minister, was improperly procured;*

³⁷⁵ For example: “The State Department. The Secretary of State”; “The Government of the Republic of Montana. The President”; “The Montana Intelligence Bureau. The Director”.

³⁷⁶ Criminal Charge No. HCSW/5.c/82, unreported.

- *Making use of any document or object, which though bearing a genuine government stamp or mark, was improperly procured.*

1.4. Forging marks and stationery

A person offends against section 204(1)(a) if he forges or alters (i) any seal, stamp or mark of a legislative body; or (ii) any seal, stamp or mark of a court; or (iii) any seal, stamp or mark of an administrative office. Any of these offences is punishable by imprisonment for from 1 to 5 years and by fine³⁷⁷.

The seal or stamp or mark contemplated by this section is that used by the relevant institution or office as sign of its authority. It is commonly an impressed stamp, which may be used dry or with an inkpad, i.e., the impression on the seal, stamp or mark can be taken by means of pressure or of ink.

It should not escape notice that forging or altering any seal, stamp or mark of a government ministry or of the office of the republican President is not within the purview of section 204(1)(a), but could possibly be prosecuted under section 203(1) as forging or altering a government stamp. Also, a person who forges another's signature in a private document lays himself open to prosecution under section 314. But the person who forges or alters the seal, stamp or mark of a private individual, institution, business or even a public corporation appears to be beyond the reach of the criminal law.

It is an offence punishable by imprisonment for from 1 to 5 years and a fine³⁷⁸, to forge or alter the printed stationery or forms (i.e., official headed paper) either of a legislative assembly, a court or an administrative office. It is also an offence punishable by the same penalty, to forge or alter any punch or mark, designed for impression, in the name of government, on weights or measures, or on merchandise. Here, the word 'merchandise' refers to all articles of commerce required by law to be marked before being put out on sale. Such 'branding' is a kind of certification that the goods were properly imported and thus may be sold in the country.

By section 204(1)(d) it is again an offence, also incurring the same penalty as the preceding offences under the same section, for a person to forge or alter any hammer used for punching government forestry marks.

The same penalty is also laid down for a person guilty of either distributing or selling or making use of any forged or altered seal or stamp or punch or mark or post-mark, or paper or coupon³⁷⁹. It is furthermore an offence, incurring the same penalty, to distribute, sell or make use of any genuine but improperly obtained seal, stamp, punch, mark, post-mark, paper or coupon³⁸⁰.

³⁷⁷ From 40,000 to 4 million francs.

³⁷⁸ From 40,000 to 4 million francs.

³⁷⁹ Section 204 (2).

³⁸⁰ Section 204 (3).

1.5. Forging postage and revenue stamps, and related offences

The offences under this head are dealt with under sections 204(1)(e), 208 and 209. Section 204(1)(e) lays down a penalty of 1 to 5 years' imprisonment and a fine³⁸¹ for anyone guilty of forging or altering (i) any postage stamp, or (ii) any postmark (i.e., marks in lieu of stamps mechanically affixed on correspondence dropped in the post), or (iii) any reply coupon issued by the postal services, or (iv) any revenue stamp (i.e., adhesive fiscal stamps issued by the Government Treasury) or impressed stamp (i.e., the stamp impressed on a document, instrument, receipt or paper attesting payment of any requisite fee, tax, etc.). Other offences are (i) the sale, or (ii) the distribution, or (iii) the use, of any forged or altered postage stamp, or postmark, or reply coupon, or revenue stamp, or impressed stamp³⁸².

Section 208 punishes deceitful conduct relating to postage and revenue stamps not amounting to forgery or even improper procurement. Under that section it is an offence (i) to make use of any postage or revenue stamp already used; (ii) to surcharge any revenue or postage stamp; and (iii) to make unauthorized use of any postal privilege. The penalty for any of these offences is imprisonment for from 10 days to 1 year and a fine³⁸³.

Section 209 makes it an offence for anyone to forge or alter either (i) a postal identity card, whether national or foreign, or (ii) any subscription card in respect of *poste restante* (i.e., the section in the post office where letters are kept till called for), or (iii) any label or stamp or postmark or reply-coupon issued by a foreign postal service. Moreover, it is also an offence to sell or to offer for sale or to make use of any such forged matter. Any of these offences is punishable by imprisonment for from 10 days to 6 months and by fine³⁸⁴.

1.6. Forging a public act, document or record

While section 314 deals with forgery of a private document, section 205 focuses on forgery of a public document. In terms of section 205(1), "Whoever forges or alters, whether in its substance or in its date, signatures or countersignatures, any act of the legislature, of the executive (including a passport) or of the judiciary, or any document or record drawn up by a person having exclusive authority so to do, shall be punished with imprisonment for from ten to twenty years." Forging constitutes one crime, while altering constitutes a separate offence.

Clearly the following conduct would fall within the terms of the provision: forging, or altering, as the case may be, an Act of Parliament; an executive order or decree; a birth, an adoption, a marriage or death certificate; a

³⁸¹ Of from 40.000 to 4 million francs.

³⁸² Section 204 (2).

³⁸³ From 5 000 to 50 000 francs.

³⁸⁴ From 5.000 to 50 000 francs.

certificate of registration of business; a court judgment, order, decree, or writ as where an untrue recital is inserted in a writ; a passport or laissez-passer or other document which could be used instead of a passport; money order, postal order, share certificates, cheques, travellers' cheques, credit cards.

Making use of a forged or altered document or record is also an offence. But the offence carries a less severe penalty than the preceding offence: imprisonment for from 5 to 10 years and a fine³⁸⁵.

In *The People v. Fongum Gorji-Dinka, Albert Mukong & 11 Others* the defendants were all members of a Calabar-based religious sect styled and known as the 'Brotherhood of the Cross and Star'. Some of them, like Gorji-Dinka and Albert Mukong, were ranked as 'prophets', others were deaconesses and pastors, most were simply adherents of the sect, while one of them was the local representative of the sect.

Gorji-Dinka, a legal practitioner based in Victoria, returned to Cameroon in September 1981 from a short visit to Nigeria. He, together with his friend Albert Mukong had been to that country to arrange for their religious sect 'crusaders' to visit Cameroon. Gorji-Dinka arrived from Nigeria with a letter from the leader and founder of the sect, one Olumba Olumba Obu, to the representative of the sect resident in Victoria. The letter announced the imminent arrival of 'crusaders' of the sect in Douala. The district officer in Victoria refused permission for the crusaders to hold public meetings.

One of the sect's members among the group that arrived from Calabar brought two documents (admitted in evidence during the trial and marked exhibits C and D) stating that recognition had been granted to the sect in Cameroon. During a meeting held in the house of Gorji-Dinka documents C and D were translated from French into English by Albert Mukong. Gorji-Dinka then went and made photocopies of the two documents. The members of the sect later went round Victoria preaching and distributing leaflets in spite of a ban on any further meetings by the group. They were arrested and detained. According to the police, investigations revealed that documents C and D were forgeries and that the latter document bore the name of Albert Mukong.

A seven-count charge was formally preferred against the defendants. Count 1 accused them of having forged in its substance a presidential decree purporting to authorise the religious sect known as the 'Brotherhood of the Cross and Star' to establish and practise in Cameroon thereby offending against section 205(1). The second count was preferred under section 205(2) and accused them of making use of the forged presidential decree. The third count accused them of forging in its substance a ministerial order purported to have been issued by the minister in charge of territorial administration authorising the formation of the administrative council of the religious sect

³⁸⁵ From 40 000 to 2 million francs.

known as the 'Brotherhood of the Cross and Star' and thereby offending against section 205(1).

Under count 4 they were accused of making use of the forged ministerial order contrary to section 205(2). The fifth count preferred under section 203(2) accused the defendants of making use of a fake presidential decree bearing the forged signatures of a named Minister, the Secretary General at the Presidency of the Republic. The sixth count alleged that the defendants made use of a faked ministerial order bearing the forged signature of another named Minister, the Minister of Territorial Administration, and thereby offending against section 203(2). Finally count 7 of the charge, preferred under section 154 of the Penal Code, accused the defendants of committing a contempt of the decision of the sub-divisional officer prohibiting the public meetings of the 'Brotherhood of the Cross and Star' religious sect.

The evidence adduced at the trial did not clearly establish what the forgery consisted of, i.e. whether the impugned documents told a lie about themselves by purporting to have been made by persons who did not make them, or whether the documents simply bore the imitation signatures of those government ministers. Each of the impugned documents represented, on the face of it, that it was an original made and signed by a government minister. None of the ministers was ever called to give evidence as to the content of the document or as to the signature appearing on it, though it could be said that that failure was professedly immaterial.

The court relied too heavily on circumstantial evidence, citing as authority for doing so the dictum of Lord Normand in *Teper v. R*³⁸⁶. But *Teper* is a case on *res gestae* (i.e. things done) and so of little relevance to the case in hand. That part of the law of evidence dealing with *res gestae* relates to the admissibility of acts, declarations and incidents, which either are constituents of, or accompany and explain, the fact or transaction in question.

The court also relied too heavily on the lay opinion evidence of two police officers as to the signatures on the impugned documents. The officers claimed to be acquainted with the handwriting of the ministers concerned and produced an alleged specimen signature of the two ministers. Handwriting may of course be proved not only by the direct testimony of the writer or of someone who saw him write but also by evidence of opinion, which may be expert opinion or lay opinion. But it would seem too much weight was placed on this evidence.

One other issue not canvassed and that the court did not advert its minded to is whether it is forgery to make a photostat copy of a forged document. On the authority of academic opinion from other jurisdictions³⁸⁷, if the person

³⁸⁶ (1952) 2 All E.R. 449.

³⁸⁷ For example, Smith & Hogan, 3rd ed., at pp. 512-513, G Williams, *Textbook of Criminal Law*, Stevens, London, 1978, p. 876.

who made the photocopy intended to confess that the Photostat is a photocopy, then the Photostat is not itself a forged document, because it is a genuine copy (and intended to be used as a genuine copy) of the original document, however false or fake the original was. But if it is intended to pretend that the Photostat copy is the original, then the Photostat copy is a forgery whether the original was a forgery or not. However, if a person makes a Photostat copy of a forged document, and utters the copy, then by uttering the copy he is deemed to utter the original, and is guilty of forgery on that account.

These concerns notwithstanding, Fongum Gorji-Dinka and Albert Mukong were found guilty on the first six counts. The trial judge observed that he was unable to find circumstances that could weaken or destroy the inference that both of them were the forgers of the documents in question. Four other defendants were convicted on counts 2, 4, 5 and 6, and the other six defendants were found not guilty on any of the charges. Those found guilty were sentenced on each count to 1 year' imprisonment with hard labour, sentences to run concurrently. The court took into account as a mitigating factor the fact that the convicted persons were all first offenders. It then invoked the provision of section 91(1) and reduced the sentence below the prescribed minimum penalty of ten years' imprisonment.

1.7. Forging licences and similar documents

Section 206 deals with specific types of forgeries and punishes them with a comparatively mild penalty (imprisonment for from 3 months to 3 years), though the penalty is doubled where the offender is a public servant (imprisonment for from 6 months to 6 years)³⁸⁸.

It is an offence to forge or alter any of the following documents: a game licence, elector's card, family booklet, military booklet, and an identity card (whether a national, consular, diplomatic, school, work or professional identity card), a driving licence (whether national, foreign or international. The passport undoubtedly serves also as an identity card, but forging or altering it is covered by section 205. These papers are all in the nature of personal and private documents. But they are delivered and vouched for by the State. Hence, any forgery or alteration of the same is considered an offence against state guarantees.

If a person procures the issue for himself or for another of any of these documents under a wrong name, he thereby commits an offence. So too the individual who makes use of any of these documents that have been forged, altered or issued in a wrong name. A person is likewise guilty of an offence if he makes a dishonest use of any of these documents, which though genuine, yet belongs to another. A name is wrong if it is not the real name of the

³⁸⁸ Section 132 (2).

individual concerned. It matters not whether the name is an assumed or fictitious one, the name of a ghost or inexistent person, or that of another person who actually exists.

1.8. Forging official certificates

Several provisions in the Code deal with bogus or fake certificates. A person who assumes a qualification or makes use of a certificate or diploma he is not entitled to, offends against s.219. The medical practitioner who issues a false medical certificate is guilty of an offence under s.259. And the individual who forges a private certificate or issues a false certificate would have to reckon with s.315.

Section 207 creates and punishes the offence of forging or altering ‘any official certificate’³⁸⁹, and also the offence of making use of any forged official certificate³⁹⁰. ‘Official certificate’ refers to a document delivered under the authority of the State formally attesting a qualification attained, or a fact such as birth, marriage, or death. The prescribed penalty is imprisonment for from 6 months to 3 years. The penalty becomes imprisonment for from 1 year to 6 years where the offender is a public servant³⁹¹.

1.9. Colourable resemblance

“Whoever manufactures, sells, distributes or makes use of any object or printed matter bearing to any object or printed matter described in sections 201-209 a resemblance liable to facilitate their acceptance in place of the object or matter imitated, or to mislead the public, shall be punished with imprisonment for from ten days to six months and with fine³⁹².”

Section 210 contemplates four distinct offences, viz.

- i. To *manufacture* any object or printed matter bearing to any object or printed matter described in sections 201 to 209 (i.e. the Great Seal; treasury security; signatures, stamps and punches; marks and stationery; public act, document or record; licences and similar documents; official certificates; postage and revenue stamps; and postal documents) a resemblance liable to facilitate their acceptance in place of the object or matter imitated, or to mislead the public;
- ii. To *sell* any object or printed matter bearing to any object or printed matter described in sections 201-209 (i.e. the Great Seal; treasury security; signature, stamps and punches; marks and stationery; public

³⁸⁹ Sub-section 1.

³⁹⁰ Sub-section 2.

³⁹¹ Section 132(2).

³⁹² From 20 000 to 200 000 francs. Section 210.

act, document or record; licences and similar documents; official certificates; postage and revenue stamps; and postal documents) a resemblance liable to facilitate their acceptance in place of the object or matter imitated, or to mislead the public;

- iii. To *distribute* any object or printed matter bearing to any object or printed matter described in sections 201 to 209 (i.e. the Great Seal; treasury security; signatures, stamps and punches; marks and stationery; public act, document or record; licences; and similar documents; official certificates; postage and revenue stamps; and postal documents) a resemblance liable to facilitate their acceptance in place of the object or matter imitated, or to mislead the public;
- iv. To *make use of* any object or printed matter bearing to any object or printed matter described in sections 201 to 209 (i.e. the Great Seal; treasury security; signatures, stamps and punches; marks and stationery; public act, document or record; licences and similar documents; official certificates; postage and revenue stamps; and postal documents) a resemblance liable to facilitate their acceptance in place of the object or matter imitated, or to mislead the public.

In each case the prosecution must go further to show a resemblance between the alleged imitation object or printed matter and the genuine object or printed matter that has allegedly been imitated. Simply establishing a resemblance will not be enough to secure a conviction under the section. The prosecution must still go further to show that the resemblance was likely to facilitate acceptance of the fake or to mislead the public.

It is worthy of note that section 210 does not punish forgery. It punishes the making, selling, distribution or use of imitation objects or printed matter. In the ordinary run of cases an imitation is just a step or an act done towards the commission of fraud. No one ever made an imitation just for the sake of it. It is always the first step towards the commission of some further fraudulent act. In such a case an imitation is merely an ingredient of a much more serious offence, such as theft by false pretences, for example. Under section 210, however, the conduct is punished as an autonomous offence because an imitation, however poor it is, would always mislead some people all the time. People in general are gullible.

§2. Counterfeiting and related offences

2.1. Counterfeiting note and coin

Section 211(1)(a)(b)(c) makes it an offence, punishable with life imprisonment, for anyone to commit any of the following offences: (i) to counterfeit any currency note or any gold or silver coin being legal tender in the country; (ii) to

alter any currency note or any gold or silver coin being legal tender in the country; (iii) to import into the country any counterfeit currency note or any gold or silver coin being legal tender in the country; (iv) to import into the country any altered currency note or any gold or silver coin being legal tender in the country; (v) to utter any counterfeit currency note or any gold or silver coin being legal tender in the country.

Many counterfeit charges that have had to be dealt with by the courts are brought under section 211(1)(c), the allegation being that the defendant uttered counterfeit notes. To utter a counterfeit note or coin is to put such note or coin into circulation, to attempt to pass off the counterfeit currency money as genuine when it is known to be counterfeit. The notion of uttering counterfeit currency money presupposes that the notes or coins in question are counterfeits, that is to say, someone else or the utterer himself has committed the crime of counterfeiting. If a person is arrested for uttering counterfeit notes the police ought to seek out the counterfeiter and charge him along with the utterer. Where the utterer is also the counterfeiter a two-count bill of indictment ought to be laid against him. But this common sense practice is hardly followed. Usually the prosecuting authorities are content to prosecute the uttering without bothering about the counterfeiting which enabled the uttering.

In *The People v. Jam Emmanuel* (1982)³⁹³ the respondent bought goats with four 5 000 francs notes suspected by the seller of the goats to be counterfeit notes. Upon complaint made to the police the respondent was arrested and prosecuted under section 211(1)(c). The alleged counterfeit notes were sent to the Central Bank for a report as to whether they were genuine or counterfeit. Up to the end of the trial no such report had been received from the Bank. The trial judge accordingly acquitted the defendant. The prosecution appealed and lost. Nyo'Wakai, CJ, Anyangwe and Asu, JJA sitting at the Bamenda Court of Appeal held that the notes were not sufficiently linked to the respondent and that right to the end of the trial in the court below the notes had not been determined to be counterfeit.

In *The People v. Thomas Njie* (1978)³⁹⁴ a person of that name collected goods worth 14 375 francs from a trader in the market and paid for them with a 10 000 francs note and the rest in other denominations. The 10 000 francs note was suspected to be counterfeit and the matter was reported to the police. Thomas Njie was arrested, prosecuted and convicted. The court took as mitigating circumstances the fact that Thomas Njie was a first offender and was married with a large family. Section 91(1) was invoked in his favour, enabling the court to sentence him to 5 years' imprisonment rather than impose the life sentence stipulated by the section. The prosecution appealed

³⁹³ Criminal Appeal No. BCA/5.c/82, unreported

³⁹⁴ Criminal Appeal No. BCA/21.c/77, unreported.

on the ground that the penalty of life imprisonment under the section is mandatory admitting of no discretion on the part of the trial judge to impose a lesser penalty. Thomas Njie cross-appealed, impeaching the evidence adduced at the trial and arguing that the trial was a nullity in view of the amendment of the statement of offence from ‘section 211(c)’ as originally framed to ‘section 211(1)(c)’ without the court taking a fresh plea from the defendant.

The Bamenda Court of Appeal (Nyo’Wakai, CJ, Ekor’Tarh and Nganje, JJA) dismissed both the appeal and the cross-appeal and confirmed the conviction and sentence of the court below. In the view of the Court, the reference to ‘section 211(c)’ was a mere typographical error with no legal consequences. There was no error in stating the particulars of the offence. The cross appellant was never misled as to the charge against him. There was no miscarriage of justice. Regarding sentence, the Court found nothing in section 211 that fetters the hands of the court from applying section 91 where circumstances so warrant to the satisfaction of the trial Judge. In the words of Ekor’ Tarh, JA delivering the unanimous decision of the Court, “Public policy alone or harm done to the State economy are not such factors that may override vital considerations in the mind of the trial court as in this case, although having a large family is not by itself a mitigating factor.”

Similarly, Inglis, J sitting in the case of *The People v. Michael Ayaba* (1975)³⁹⁵ at the Buea High Court had no difficulty in convicting the defendant of possession of counterfeit notes and of uttering counterfeit notes. The defendant got 5 years for possession and 20 years for uttering, both sentences being ordered to run concurrently. In that case the defendant presented 9 five thousand francs notes torn in halves to the principal cashier at the Central Bank in Victoria and asked him to exchange those mutilated notes for new ones. The Bank found the notes, which were in eighteen halves, to be counterfeits, alerted the police and the defendant was arrested and prosecuted.

The defendant admitted the notes to be his but gave the following account in an effort to exculpate himself from the two-count charge preferred against him. He said he went to open an account with Cameroon Bank in Kumba, gave the cashier of the bank 45 000 francs made of one 5.000 francs note and forty 1 000 francs notes. The cashier informed him he needed 50 000 francs to open an account and since he could not find the extra 5 000 francs he was no longer interested in opening the account. The cashier suggested to him it would be more convenient for him to carry the 45.000 francs in nine 5 000 francs notes. Nine 5 000 francs notes were then given to him and he took them to his home where, for safekeeping, he put them between two planks near the head of his bed.

Four months later when he went to retrieve the money to take to his village on leave he found to his utter consternation that the notes were cut in

³⁹⁵ Charge No. HCSW/17.c/74, unreported

half. Rainwater had spoilt the notes. His neighbour advised him to take the notes back to the cashier at Cameroon Bank, Kumba who in turn advised him to take the notes to the Central Bank in Victoria and that was how he went to that Bank. The learned trial Judge dismissed this narration as “puerile as it is far- fetched”. He held that the defendant had the counterfeit notes in his possession and that he had uttered them to the principal cashier at the Central Bank. In passing sentence the Judge was unmoved by the offender’s plea of being a double orphan.

The defendants in *The People v. Okon Lazarus Ekpo & 2 Others* (1977)³⁹⁶ got 12, 8 and 10 years respectively from Ngalame, J sitting at the Buea High Court, when they contrived to slip a 10.000 francs counterfeit note among genuine currency notes and then had one of them to deposit the total sum into his savings account at a bank in Tiko. The 10.000 francs note in question was detected by the bank and confirmed by a report of the Central Bank to be counterfeit. Pleas of being first offenders and of being married with several children cut no ice with the Judge who, in passing sentence, observed that the offence of counterfeiting currency money was on the increase and that “the courts have a bounden duty to reduce the frequency at which people commit the offence if not completely eradicate it.”

A common ploy used by counterfeiters and their accomplices to utter counterfeit notes consists in the utterer paying for drinks with the fake money, usually of high denomination, and getting change. In *The People v. Simon Kum Fang* (1977)³⁹⁷ the defendant went into an off licence bar and bought assorted soft drinks for 1 030 francs and in payment gave 10 000 francs note and got change. The 10 000 francs note was discovered to be counterfeit and this fact was confirmed by a report of the Central Bank. The defendant was arrested and prosecuted. His defence was a complete denial in the nature of an *alibi* (meaning, he was *elsewhere* at the time when the offence charged was committed), namely that he did not utter the alleged 10 000 francs counterfeit note or any other money at all to the off licence bar attendant and that he never visited the bar in question on the day alleged.

Citing persuasive authority from England³⁹⁸ and Nigeria³⁹⁹, Njamnsi, J sitting in the High Court at Buea, observed, “It is settled law that where an accused person sets up a defence of alibi he does not thereby assume any burden of proving it but the prosecution has the burden of disproving the alibi as well as proving the guilt of the accused beyond any shadow of doubt. ... It is solely on the totality of the evidence of the prosecution that the guilt or an acquittal of an accused person must be determined.” After carefully going

³⁹⁶ Charge No. HCSW/69.c/76, unreported.

³⁹⁷ Charge No. HCSW/9.c/77, unreported.

³⁹⁸ *R. v. Johnson* (1961) 3 All E.R. 969.

³⁹⁹ *The State v. Obinga & Others* (1965) N.N.L.R. 172.

through the evidence adduced in court the learned trial Judge came to the settled conclusion that “the prosecution have disproved the alibi of the accused and proved the guilt of the accused on the indictment made against him beyond all reasonable doubt as required by law.”

The defendant was accordingly convicted and got 16 years for all his troubles. The Judge did not appear to have been moved by the *allocutus* (plea in mitigation), which claimed remorsefulness on the part of the offender, and drew attention to the fact that he was married and father of three children, the sole breadwinner of his family and caregiver to his aged father and mother. Echoing the sentiments of Ngalame, J in *The People v. Okon Lazarus Ekpo*, Njamnsi, J grounded his stiff sentence on the fact that “trafficking in Cameroon currency money by means of counterfeiting [is] a serious offence because it ruins the economy of this Republic.”

The court’s finding of mitigating circumstances (first offender, young man, and the circumstances of the case) in favour of the offender in the case of *The People v. Alfred Eseme* (1978)⁴⁰⁰ did not save him from a stiff sentence. In that case the defendant went into a bar with a group of friends. They had a good drink and defendant paid for the drinks with a 10 000 francs note that on close examination did not appear to be genuine money. The bartender gave back the note to defendant and asked for 2 500 francs being the bill for the drinks consumed by the defendant and his friends. The defendant refused to take the 10 000 francs note. On complaint being made to the police the defendant was arrested and prosecuted for uttering a 10 000 francs counterfeit note. The note was sent to the Central Bank for analysis. The Bank certified in a report that the note was indeed counterfeit. Justice Mrs Lucy Gwanmesia, sitting in the High Court at Buea had no difficulty in convicting the defendant and sentencing him to 15 years imprisonment.

In *Samuel Ngong v. The People* (1979)⁴⁰¹ the appellant went into an off licence bar and in an unusual show of generosity ordered beer to be given to some customers who were in the bar. He then gave the bartender a 10 000 francs note and demanded change. The note was torn and looked suspect. The bartender showed it to a police man who happened to be in the bar and he declared the note to be bad saying he would take it to Cameroon Bank for ascertainment as to whether it was counterfeit or not. The bartender did not accompany the appellant to the Bank. A search of the appellant’s person and premises yielded no evidence to connect him with the offence of counterfeiting or any other offence. Key witnesses whose names appeared on the back of the indictment were never called and no satisfactory legal reason was given for their absence. The Bamenda Court of Appeal (Nyo’ Wakai, CJ, Mbuagbaw and Anyangwe, JJA) held that the evidence against appellant was

⁴⁰⁰ Charge No. HCSW/17.c/77, unreported.

⁴⁰¹ Criminal Appeal No. BCA/15.c/79, unreported.

speculative and lacked the cogency to meet up with the high standard of proof required in criminal cases. The Court accordingly allowed the appeal and set aside the conviction and sentence by the trial court.

The appeal in *The People v. Mohamed Issoufou Damouna* (1982)⁴⁰² also succeeded on the ground of lack of evidence on which the trial court could have convicted. Mohamed reared cattle and was also a trader. He borrowed 1.5 million francs from **A** to buy horses, which he did. The money was found to be counterfeit. He and a number of other persons were prosecuted and convicted under s. 211 (1)(c). The defence case was that the notes making up that amount were got from **B**, who in turn identified **C** as the person from whom the notes were got, and **C** named **D** as the originator of the same. The police did not bother to look for **D**.

The Bamenda Court of Appeal (Nyo' Wakai, CJ, Asu and Anyangwe, JJA) set aside the conviction of Mohamed and his sentence to 20 years imprisonment on the ground that there was no persuasive reason why Mohamed was convicted while one of the co-accused, the person who lent him the 'money', and therefore an utterer of the counterfeit notes, was set free. Moreover, the Court reasoned that the defendants did not act in concert, that the conduct of Mohamed in rushing to the seller of the horses to recover the counterfeit notes and in taking the police to the person who had lent him the 'money' thereby enabling the police to know all those who formed the chain of the uttering, clearly negated criminal intent. The learned Justices of Appeal cited with approval the principle of law stated in *R. v. Price*⁴⁰³, and *R. v. Bird*⁴⁰⁴, and elaborated upon by the learned authors of *Phipson on Evidence*⁴⁰⁵ as follows, "Where several defendants are charged with a criminal act, but only one unidentified defendant commits it, the jury [in this country the notional jury] must, in the absence of proof of a common design, ascertain who was the actual perpetrator, or failing this must acquit all." It is however submitted that the instant case was not one in which there was only one unidentified defendant who committed the criminal act of uttering counterfeit notes. **A** uttered the notes to **X**, **A** identified **B** as the one who uttered them to him, **B** identified **C** as the one who uttered them to him, and **C** named **D** as the one who had uttered them to him. There was an uttering in each case and each of the utterers can properly be convicted, provided each has the necessary criminal intent.

The law punishes very severely not only the act of counterfeiting the national currency⁴⁰⁶. It also punishes very severely the act of importing

⁴⁰² Criminal Appeal No. BCA/21.c/81, unreported.

⁴⁰³ 8 Cox 96.

⁴⁰⁴ 5 Cox 11.

⁴⁰⁵ 9th Edition, at p. 99.

⁴⁰⁶ This offence is punishable even when committed abroad, provided the offender has been

counterfeits of the national currency, or of uttering any counterfeit of the national currency.

Section 211(1) is concerned with the national currency, that is, currency issued by the State and therefore legal tender in the country. The section deals with ‘currency notes’, that is to say, banknotes or paper money used as a medium of exchange in the country. It also deals with ‘gold or silver coins’ that are legal tender in the country in which they are issued. Gold or silver coins are pieces of metal containing varying amounts of gold or silver, producing the appearance of gold or silver and used as a medium of exchange authorized or adopted by the government of the country or by a foreign government as part of its currency.

The Central Bank has the sole right to issue currency notes and coins in the country. Any unauthorized striking of money by another is an offence under section 215(a), as is counterfeiting money under section 211(1)(a). Counterfeit money is any money that has not been issued by the lawful issuing authority. It is thus money that is not genuine, but resembles or is apparently intended to resemble or pass for genuine money. Money is also counterfeit if the note or coin is genuine but has been altered so as to resemble or pass for money of a higher denomination. In the case of a coin, if it is genuine but has been clipped or filled, or its size or weight diminished, it is nonetheless a counterfeit note. Money is a medium of exchange authorized or adopted by a domestic or foreign government as part of its currency.

The offence of counterfeiting currency note or coin is deemed completed although the note or coin counterfeited is not in a fit state to be uttered, or the counterfeiting is not yet finished or perfected. Uttering counterfeit note or coin is a distinct offence. Therefore, on a charge of counterfeiting it is not necessary to prove that the counterfeit note or coin was uttered or that the accused attempted to utter it. If the accused uttered counterfeit notes or coins which he himself had counterfeited, he would have committed two distinct offences, namely, counterfeiting the notes or coins (section 211(1)(a)), and uttering counterfeit notes or coins (section 211(1)(c)).

However, evidence of uttering is often the clearest proof of *scienter*, that is, proof that the accused intentionally counterfeited the money. By section 55 of Schedule III (B) to the Code, where a person has ten or more unfinished counterfeit coins in his possession, the court may presume that he has made them or that he had been a participant in the making of them, unless he proves the contrary. These days, counterfeiters no longer bother to counterfeit notes of lower denomination, and, *a fortiori*, coins. The time, trouble and risk involved are not worth the game.

Section 211(2) makes it an offence for anyone either to counterfeit, or to

arrested within the jurisdiction or has been extradited thereto: section 8(b).

import, or to utter “*any other currency note or coin, national or foreign, and whether or not legal tender.*” The penalty for any of these three offences under the sub-section is imprisonment for from 10 to 20 years. Whereas sub-section (1) of section 211 deals with currency note or coin that is legal tender in the country and is issued by the State, sub-section (2) of the same section deals with any other currency note or coin be it national or foreign and whether or not legal tender in this country. For example, any other currency note, the counterfeiting or importation or uttering of which would fall within the mischief of the section, would be a currency that is in a nickel coin, a copper coin, or a bronze coin.

Any of these forms of conduct is punishable even if the currency in question is no longer legal tender, as in the case of bank notes the Central Bank has declared to cease being legal tender and has called in. In an environment still largely illiterate crooks can easily abuse the confidence of innocent people by continuing to pass such bad bank notes. Section 211(3) is therefore partly aimed at protecting unsuspecting individuals from confidence tricksters. It is also largely out of this consideration that the section also punishes with imprisonment for from 6 months to 5 years, the alteration of any coin, whether or not legal tender internally or abroad, consisting in *mere colouring* of the said coin. Such colouring may mislead unsuspecting individuals as to the exact nature of the metal used.

If a person receives a currency note or coin in ignorance of the fact that it is a counterfeit, he is guilty of an offence if after becoming aware of the same, he nevertheless utters it⁴⁰⁷. The penalty is imprisonment for from 3 months to 3 years and a fine of three times the face value of the said note or coin. This is a far lenient penalty than that prescribed for the person who knowingly receives a counterfeit currency note or coin and intentionally utters the same. This comparatively benign punishment appears to be based on the consideration that the offender innocently received the counterfeit currency.

2.2. Manufacture or possession of counterfeiting equipment

A person is guilty of an offence if he *manufactures* any counterfeiting equipment; and he is also guilty of an offence if he *possesses* any counterfeiting equipment⁴⁰⁸. Either offence is punishable by imprisonment for from 5 to 10 years and a fine⁴⁰⁹.

Section 212 takes a very broad view of what counterfeiting equipment is. The section provides that it is “any instrument, apparatus, machine or material designed for the forgery of the Great Seal, any treasury security, or any punch, stamp or mark, or for the counterfeiting of note or coin, whether national or

⁴⁰⁷ Section 211(4).

⁴⁰⁸ Section 212.

⁴⁰⁹ Of from 50 000 to 1 million francs.

foreign.” However, since an instrument or apparatus may be manufactured or possessed for legitimate purposes, the offence is committed only when such manufacture or possession was ‘without authority’. Still, the way the offence is couched appears infelicitous. The phrase ‘without authority’ governs the whole of the rest of the section. So that it is as though one can have authority to manufacture or possess counterfeiting equipment.

In order to secure a conviction under section 212 the prosecution would have to prove that the accused possessed (or manufactured, as the case may be) the instrument in question. He would also have to prove that the said instrument is designed for forging or counterfeiting. An instrument designed for forging (or for counterfeiting, as the case may be) is one specifically or exclusively made for that purpose. If such an instrument though specifically designed for forging (or for counterfeiting) can nevertheless be used for another purpose it is doubtful whether in the absence of evidence linking the instrument to forging (or to counterfeiting) the accused can properly be convicted under section 212.

Once possession (or the fact of having manufactured, as the case may be) is proved, and it is also proved that the instrument is for the said incriminating purpose, the evidentiary burden shifts to the accused. He must then satisfy the court, on a balance of probability, that he had lawful authority to possess (or manufacture, as the case may be) the said instrument. Throughout the trial, however, the legal burden rests squarely on the prosecution to adduce conclusive evidence of possession (or manufacture, as the case may be).

In *Joseph Fogen Tah v. The People* (1970)⁴¹⁰ Endeley, J in the High Court at Buea convicted the appellant of being in possession of counterfeit equipment contrary to section 212 of the Penal Code and sentenced him to 5 years’ imprisonment. The facts on which the appellant was convicted were as follows. In the course of a traffic check the police found appellant in possession of a sealed carton containing black papers cut to the approximate size of 1 000 francs notes of the country’s currency and three small bottles containing coloured liquid, one blue, one green and one white. The police were suspicious. They took the appellant, the papers and the bottles to the Police Mobile Wing station where appellant was cautioned and later taken to the Buea Police Station for further investigation.

The appellant told the police, freely and voluntarily, that the papers and the bottles were sold to him by an unknown person in Tiko and that he was given to understand by that unknown person that money could be made with them by a photographic process. He also informed the police that the unknown person had, actually, in his presence, used the liquids, contained in the bottles, on the paper to make a note of 1 000 francs, but that the person performed the whole process under a black cloth. He said he had paid 250 000 francs for

⁴¹⁰ (1968-1970) UYLR 123.

the paper and bottles. The learned trial Judge disbelieved the appellant's testimony and convicted him.

On appeal it was argued on behalf of the appellant that there was no proof by the prosecution that the papers and the bottles were materials designed for counterfeiting the currency of the Republic. It was further contended that the appellant was the victim of a hoax and that he had been swindled out of 250 000 francs for worthless paper. It was submitted that mere black paper cut to a certain size with small bottles containing unascertained liquid could not be shown beyond reasonable doubt to be materials designed for the counterfeiting of notes as required by section 212 of the Penal Code. The appeal was allowed on the ground that the prosecution had failed to prove that the papers and the bottles of liquid found in the possession of the appellant were material designed for the counterfeiting of notes within the meaning of section 212 of the Penal Code.

Delivering the judgment of the West Cameroon Court of Appeal (Cotran, CJ, Kesiro and O'Brien Quinn, JJA), O'Brien Quinn, J said, "The burden of proving that the papers and bottles of liquid were 'material designed for ... counterfeiting' lay on the prosecution and whether the evidence and confessions of the appellants were true or false the burden did not shift to the defence until the point had been established. Whether the accused believed or not that they were 'material designed for ... counterfeiting' is immaterial since the prosecution had to prove that they were, and this they failed to do."

The Bamenda Court of Appeal (Thomas, CJ, Inglis and Ekor' Tarh, JJA) also allowed the appeal in *Fung Two Penny & Kum James v. The People* (1973)⁴¹¹. The facts of the case were that X gave information to the Police and then to the Gendarmes alleging that the 1st appellant was in possession of a mould capable of striking 100 francs coin currency of the State. An investigation was carried out but no mould was found. However, during a search of the premises of the 1st appellant two 500 francs negative films, a quantity of black and white papers cut to the size of 500 francs notes, 2 bottles appearing to contain some white and blue liquid substance, a small tin, 4 pieces of lead material, and two 500 francs counterfeit notes apparently printed from the negatives were all recovered from 1st appellant's pit latrine.

In fact, X, on his own admission, had in revenge planted these exhibits in 1st appellant's premises to implicate him. Both appellants were convicted and sentenced by the trial Magistrate. The only evidence against 1st appellant was that of X, a co-accused at the trial in the court below. The Court of Appeal observed that the evidence of X should have been scrutinized very carefully and only accepted as conclusive on the guilt of the appellants on being

⁴¹¹ (1971-1973) UYLR 101.

satisfied that the maker was speaking the truth, which was not the case as the maker was “a most untruthful witness to be believed.” The Court was unable to find strong evidence that could possibly have justified the conviction of the appellants. The appeal was accordingly allowed.

2.3. Improper possession of certain things

Section 213 would seem to be an *omnium gatherum* (i.e. an omnibus) provision. It makes it an offence to possess, without authority, “anything or document described in ss.201 to 211.”

The offence is wider than that of possessing counterfeiting equipment. Under s.213 the mere possession of anything or document as described under sections 201-211 is an offence punishable with imprisonment for from 1 to 5 years. Possession of a forged or altered document, possession of anything for counterfeiting or forging, or possession of counterfeit currency note or coin falls within the mischief of the section.

The charge of possession of counterfeit currency notes succeeded in the case of *Emmanuel Ngam v. The People* (1982)⁴¹². There, the police while carrying out a lawful search in the house of the appellant found in his bedroom 101 five thousand francs counterfeit notes. The notes had been put in khaki envelopes and neatly placed inside a mattress that was then stitched up by the appellant. The appellant got four years for being in possession of counterfeit notes and his appeal against conviction and sentence for this offence failed. The Bamenda Court of Appeal (Nyo’ Wakai, CJ, Anyangwe and Asu, JJA) declined to hold that the appellant was, as he contended, an innocent possessor.

It is however a defence under the section for the accused to show that he had authority to possess the thing or document in question. For example, he can show that the document in his possession is incriminating evidence to be tendered at a pending or an impending criminal prosecution; he can show that the counterfeit banknotes in his possession were notes he was mandated to destroy. It is submitted that lack of knowledge, for example that the notes in question are counterfeit is a credible defence under the section.

In *Biemi Vernatius v. The People* (1982)⁴¹³ a trader travelled to Nigeria and left his store in the charge of his wife. When he returned his wife handed to him 30 000 francs realised from the sales. Unknown to him there was a 10 000 francs note among the 30 000 francs that was a counterfeit note. The police eventually found the 10 000 francs note on him during a routine check at the border as he was returning from a trip to Nigeria. At the trial he pleaded ‘guilty’ and explained that he did not know that the 10 000 francs note was counterfeit. The trial court accepted the ‘guilty plea’ and sentenced the appellant to 3 years’ imprisonment with hard labour. On appeal it was held

⁴¹² Criminal Appeal No. BCA/38.c/81, unreported.

⁴¹³ Criminal Appeal No. BCA/14.c/81, unreported.

(Nyo' Wakai, CJ, Asu and Anyangwe, JJA) allowing the appeal, that the learned trial Magistrate was wrong to have accepted the plea of guilty because a "prisoner is not to be taken to admit an offence unless he pleads guilty to it in unmistakable terms with appreciation of the essential elements of the offence." The Court followed its earlier decision on this point in the case of *Francis Wanzi & 2 Others v. The People* (1976)⁴¹⁴.

§3. Usurpation

Usurpation is any wrongful assumption of power or authority. It is the false assumption of a power, an authority, a capacity or an attribute that one does not legally have.

3.1. Unauthorized striking money

Section 215 does not punish the swindler who counterfeits currency notes or coins. It does not punish the crook who makes, sells, distributes or uses imitation stamps and documents. Such miscreants are punishable under sections 210 and 211.

Section 215 is concerned with the unauthorised striking (minting) of money and the unauthorized manufacture or possession of equipment capable of use for the striking or printing of any note or coin liable to be mistaken for lawful note or coin. A person guilty of an offence under the section is liable to imprisonment for from 5 to 10 years and to a fine⁴¹⁵.

The rationale for the offences under the section is that the right to mint money in the country is the monopoly of the state. All persons within the state, citizens and non-citizens, are legally bound to accept the national currency as legal tender within the territory, that is, as legally valid medium of exchange for the payment of a debt or an obligation. The state does not suffer any currency other than its own to be put in circulation within the country without its authorisation. An unauthorised striking of money is tantamount to the usurpation of a privilege that is the monopoly of the state.

A person is guilty of an offence under section 215(a) if he (i) strikes without authority coin of whatever form or denomination; or (ii) prints without authority any note payable to bearer; or (iii) imports without authority any coin of whatever form or denomination; or (iv) imports without authority any note payable to bearer; or (v) utters without authority any coin of whatever form or denomination; or (vi) utters without authority any note payable to bearer.

Under section 215(b) it is an offence to manufacture, and also another offence to possess, any machine, apparatus, instrument or material capable of use for the striking or printing of any note or coin liable to be mistaken for lawful money. The difference between this provision and section 212 is that

⁴¹⁴ Criminal Appeal No. BCA/14.c/75, unreported.

⁴¹⁵ From 50 000 to 150 000 francs.

under the latter provision the equipment is *designed* for forging or counterfeiting. In the former provision the equipment is not so designed, but is capable of use for making notes and coins liable to be mistaken for lawful money.

3.2. Unlawful assumption of an office

Section 216 punishes three distinct forms of conduct as ‘usurpation of office’.

Any person who *assumes any public office, civil or military, to which he is not appointed*, commits an offence punishable by imprisonment for from 6 months to 5 years⁴¹⁶. By holding himself out or by pretending to be the holder of a specific public office when in fact he has been appointed to no such office, the usurper is misleading the public into believing or assuming that he is the holder of that office.

A person also offends against section 216(1) if he *performs any act belonging to any office to which he has not been appointed*. This provision catches the person who, after assuming a public office to which he has not been appointed, goes further to perform an act belonging to that office. Here, two crimes have in fact been committed, an earlier one committed so as to enable the commission of the subsequent one: assuming a public office to which one has not been appointed, and then performing an act belonging to that office. But only one offence, the last one, is charged on the reasoning that the earlier offence is necessarily included in the subsequent one, so that it would

In *Enongang Reuben Takwe & 2 Ors v. The People* (2008)⁴¹⁷, the three appellants were convicted by the Momo High Court in Mbengwi on a three count charge, to wit usurpation of office contrary to section 216(1), simple harm contrary to section 280 and slight harm contrary to section 281. The facts that gave rise to these charges were as follows. During the British colonial administration in the Southern Cameroons Chief Mbafor of Ashong village was jailed for tax offences, stripped of his chieftaincy title and replaced by Enongang as the new chief of Ashong. That was in 1943. Mbafor later died. Many years later, in 1968, Chief Enongang also passed on. His son, DC Enongang and the son of the dethroned and long deceased Chief Mbafor, DA Mbafor, now staked their respective claim to the Ashong chieftaincy throne. In 1969 the Prime Minister of West Cameroon referred the dispute to the Chieftaincy Advisory Council which in 1970 recommended the recognition of DA Mbafor as the Chief of Ashong. In 1972 DA Mbafor was gazette as the Chief of Ashong. The Senior Divisional Officer for Momo brought this fact to the attention of DC Enongang and cautioned him against passing off as chief. Chief DA Mbafor ruled until 1994 when he died testate, naming an heir to succeed him on the throne. One Enongang Reuben Takwe, claiming to be the

⁴¹⁶ Section 216(1).

⁴¹⁷ Criminal Appeal, No. BCA/MS/22c/2004, unreported.

son of DC Enongang and the rightful chief of Ashong decided to style himself “His Royal Highness the Chief of Ashong”. He demanded that the people of Ashong pay him allegiance as their chief. He forcefully claimed chiefly perquisites and privileges and organised a group of people to exact the same from persons in the village. In the process some people were beaten up and they sustained injuries. It is on these facts that the appellants were convicted and they appealed. The Court of Appeal (Nko, Mboh, Fonjock, JJA, Vice Presidents, per Mboh, J) saw merit in the conviction, describing Enongang Reuben Takwe as “an impostor ... sowing seed of discord, animosity, confusion, conflict and rivalry in Ashong village.” However, the appeal was allowed on a technicality. The trial court had not complied with section 164(1)(2) of the Criminal Procedure Ordinance which sets out the mandatory procedure for amending a charge. A retrial was ordered and Enongang Reuben Takwe required to enter into a recognizance, in the sum of 1 500 000 francs for three years to keep the peace.

It is noteworthy that section 216 (1) also catches the busybody who, although not having assumed a public office in the first place, nevertheless meddles with it by performing an act of the said office.

Subsection (2) of section 216 deals with the situation where *a public servant continues to act in an office* after he has been officially notified of his temporary or final cessation from the said office. Such impertinent conduct incurs a penalty of 3 months to 2 years’ imprisonment.

Where a usurper takes advantage of his usurpation of office to commit any offence of misconduct in public office⁴¹⁸ he is liable to punishment as if he held the office usurped⁴¹⁹. This means he is treated and punished for the particular crime of misconduct in public office he has committed as though he were a public servant.

On conviction for an offence under section 216 the court may, in passing sentence, also impose the forfeitures described in section 30.

A person cannot be arrested without warrant for an offence against section 216.

3.3. Irregular solemnization of marriage

The law confers on the registrar of marriages the sole right to conduct all civil marriages⁴²⁰. No religious solemnization of a marriage may take place before the civil ceremony and if after that ceremony, may not take place without proof of the civil marriage.

Section 217(1) therefore forbids all ministers of religion, under pain of punishment, to solemnize a religious ceremony of marriage without having

⁴¹⁸ Sections 134-151.

⁴¹⁹ Section 216 (4).

⁴²⁰ Civil Status Registration Ordinance, 1981, s.48.

seen a certificate of marriage attesting to a civil marriage already performed by the registrar of marriages. A minister of religion who falls foul of this provision is liable to a fine⁴²¹ and, on subsequent conviction within the meaning of section 88 of the Code, with imprisonment for from 1 to 5 years.

The words ‘not being authorized to perform a civil marriage’ are introduced in the subsection. But that is a meaningless addition because the law does not authorize a minister of religion to perform a civil marriage. For the same reason subsection (2) of section 217 would seem redundant as well.

3.4. Use of any uniform or decoration not entitled to

It is an offence under s.218 to wear in public any:

- Uniform to which one is not entitled;
- Uniform which bears a colourable resemblance to a uniform to which one is not entitled;
- Decoration to which one is not entitled;
- Decoration that bears a colourable resemblance to a decoration to which one is not entitled.

It is immaterial whether the uniform or decoration is foreign⁴²². The law prohibits wearing in public, not wearing in private. It is therefore not an offence under the section to wear such uniform or decoration in private. In certain circumstances wearing of such uniform or decoration even in public would not be an offence. It is thus not an offence to wear such uniform and decoration at children’s games, even in public⁴²³. Furthermore, actors, amateurs or professionals, at a public entertainment who wear such uniforms or decorations do not commit an offence⁴²⁴.

A conviction for an offence under section 218 carries a term of imprisonment for from 3 months to 2 years and/or a fine⁴²⁵. In passing judgment the court must order that a marginal annotation of the said judgment be made on any deed attested by a notary public or register of births, marriages and deaths in which the title (corresponding to the uniform or decoration worn) has been assumed, and may also order publication of its judgment⁴²⁶.

3.5. Use of any qualification not entitled to

Section 219 visits with imprisonment for from 3 months to 2 years and/or

⁴²¹ From 5 000 to 30 000 francs.

⁴²² Section 221 (1).

⁴²³ Section 221 (2).

⁴²⁴ Section 221 (2).

⁴²⁵ From 5 000 to 500 000 francs.

⁴²⁶ Section 221 (3).

with fine⁴²⁷, any person who, without being entitled thereto makes use of either (i) a qualification belonging to a profession legally regulated (e.g., legal practice, engineering, medicine, nursing, dentistry, pharmacy, accountancy, etc.); or (ii) an official degree, certificate of education or diploma; or (iii) a title governed by public regulation.

An offence under the section is committed even where the qualification, degree or title is a foreign one⁴²⁸. It must however be shown that the accused was not entitled to the qualification, degree or title, as the case may be, and that he made use of the same. A person makes use of a title (or qualification, as the case may be) if, for example, he represents orally or in writing that he has it, as where he styles himself or gets others to address him by a given title (for example, Dr., Professor, Engineer etc.). A person makes use of a degree if, for example, he states in his business card that he has the degree, or he uses the degree to get a job or to get admitted to an institution or to be exempted from certain educational requirements. In the case of a qualification, however, it must be shown that it is one *belonging to a profession legally regulated*. In the case of a degree (or certificate or diploma) it must be shown that it is *official*. And in the case of a title it must be shown that it is one *governed by public regulation*.

Section 219 does not however apply to the actors at a public entertainment or to children's games⁴²⁹. On conviction and sentence under the section the court must also order that a marginal annotation of the said judgment be made on any deed attested by a notary public or register of births, marriages and deaths in which the title has been assumed, and may further order publication of its judgment⁴³⁰.

3.6. Use of any title of honour not entitled to

Any person who makes public use of any title of honour⁴³¹, whether national or foreign, to which he is not entitled, commits an offence punishable by mere fine⁴³². It must be shown that the accused was not entitled to the title of honour and that he made *public* use of the same.

It is a defence on a charge under this section that the accused used the title of honour at a children's game. It is also a defence that the accused is an actor, amateur or professional, who used the title of honour while performing at a public entertainment⁴³³.

On a conviction and sentence under section 220 the court must order that

⁴²⁷ From 100 000 to 2 million francs.

⁴²⁸ Section 221(1).

⁴²⁹ Section 221(2).

⁴³⁰ Section 221(3).

⁴³¹ For example, 'Chief', 'Prince', 'Excellency', 'Eminence', 'Alhadji', 'Sheik', 'Honourable', 'Lord', 'Knight', 'Right Honourable', 'Ambassador'.

⁴³² From 5 000 to 2 million francs. Sections 220 and 221(1).

⁴³³ Section 221(2).

a marginal annotation of the said judgment be made on any deed attested by a notary public or a register of births, marriages and deaths in which the title has been assumed, and may also order publication of its judgment⁴³⁴.

§4. Offences affecting guarantees to the national economy

4.1. *Injury to the credit of the state*

It is an offence to *spread* publicly any *false or misleading rumour* liable to undermine confidence in the stability of the currency or in the value of any public funds⁴³⁵. The offence is committed only where the accused spread the rumour with the *specific intent* to injure (i.e., undermine) the credit of the state. How the rumour is spread is immaterial. It may be verbally or in writing, or through the print or audiovisual media, or through the Internet. However, it must be shown that the rumour was public, and either false or misleading. The rumour need not have actually undermined confidence in the stability of the currency or in the value of any public funds. It is sufficient that the rumour was *liable* to do so. 'Public funds' include the funds of any cooperative, or of any authority or corporation either public or subject to the administrative control of the state, or in which the state holds directly or indirectly the majority of the shares.

It is also an offence to *encourage* the public *to withdraw* funds from any public deposit or from any establishment bound by law to pay into a public deposit⁴³⁶. Again, it is an offence *to encourage* the public *to sell* any government loan or other treasury paper⁴³⁷. It is similarly an offence *to discourage* the public from *purchase of or subscription* to any treasury paper (bill)⁴³⁸.

The method used to spread, encourage, or discourage, as the case may be, is of no moment. But the act must have been addressed to the public and done with intent to injure the credit of the state. The law is little concerned with the reasons which may have prompted the accused to act the way he did. The reasons may be false or even true. The accused may have been actuated by malice or even laudable motives. It does not matter. However, the offence is not committed if it is not the public that was encouraged or discouraged, but an individual or a private group such as an association or club.

Any of these offences is punishable by imprisonment for from 3 months to 2 years and a fine⁴³⁹. On conviction and sentence for an offence under section 222 the court must also order publication of its judgment⁴⁴⁰.

⁴³⁴ Section 221(3).

⁴³⁵ Section 222 (1)(a).

⁴³⁶ Section 222 (1)(b).

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ From 200 000 to 2 million francs.

⁴⁴⁰ Section 222(2).

4.2. Refusal of note or coin that is legal tender

Whoever refuses any note or coin being legal tender in the state and to the extent that it is legal tender, is guilty of an offence under section 223 and liable to imprisonment for from 10 days to three months and/or fine⁴⁴¹.

Refusal of any currency note or coin is an offence only to the extent that the note or coin is legal tender within the country. Supposing the government decides that the payment of any credit above say 500 000 francs must be by a bill of exchange (e.g., bank cheque, postal cheque, bank draft). A creditor who is owed say 1 million francs and who refuses currency notes amounting to the sum owed is not guilty of an offence even though said notes are legal tender in the country. A creditor is also not guilty of refusing money that is legal tender if he refuses the tender of part payment of a debt owed to him. This is so because he is legally entitled to demand full payment of the debt and may refuse notes and coins which though legal tender, do not amount to the total debt owed. A person may also legitimately refuse any bank note whose number has been torn, defaced or otherwise rendered illegible because such a note is suspect. But a person is not entitled to refuse any note that is legal tender simply because it is old, dirty, rumpled or slightly torn.

4.3. Injury to national development

Section 224 provides: "Whoever with intent to injure the national development transfers abroad any specialized staff or delivers abroad any industrial or commercial secret, shall be punished with imprisonment for from six months to two years and with fine⁴⁴²."

This section creates and punishes two distinct offences: (i) transferring abroad any specialised staff; and (ii) delivering abroad any industrial or commercial secret. In either case the conduct is punishable only if it was done with the *specific intent* to injure 'national development' (a vague concept).

4.4. Misappropriation of loans and subsidies

"Whoever puts to any use other than that for which it was granted a loan or subsidy from [the federal or state government], from a co-operative, or from an authority or corporation described by s.184, shall be punished with imprisonment for from one to ten years and with fine⁴⁴³."

The rationale for this offence is that the loan or subsidy is money that belongs to the State and was granted on the basis of the incidence its use may have on the economic plane. Consequently, misappropriation of this money or putting the money to a use other than for its intended purpose constitutes an injury to state finances and government's economic programme.

⁴⁴¹ From 1 000 to 100 000 francs.

⁴⁴² From 100 000 to 5 million francs.

⁴⁴³ From 10 000 to 1 million francs. Section 225.

In order to secure a conviction under the section the prosecution must prove that the defendant, D, was granted a loan or subsidy; that the loan or subsidy was granted by the government or a co-operative or any public body as described by s. 184; that the loan or subsidy was granted for a named specified purpose; and that the loan or subsidy was put to a use other than for the specified purpose for which it was granted.

A subsidy is financial aid or assistance granted by the government, co-operative or public body to an individual or private enterprise deemed beneficial to the public. Such assistance is normally granted to be used for a specific purpose and the money thus advanced is not required to be paid back as long as it is used for its intended purpose. A 'loan' on the other hand is a sum of money lent (sometimes to be used for a specific purpose but often not) and to be returned with or without interest; the money is regarded as a debt to be repaid.

In *Tumenta Teboh v. The People* (1974)⁴⁴⁴ the Bamenda Magistrates' Court convicted the appellant for putting sums of money into use other than the use to which they were entrusted to him, and sentenced him to four years' imprisonment with hard labour. Appellant was a farmer who received money advances from the Ndop Co-operative Farmers Union with which he purchased coffee from other farmers for delivery to the Union at a commission. During one coffee season he received 500 000 francs but it was alleged that the coffee he supplied was short by an amount estimated at 29 595 francs and that he promised to make good the deficiency the following coffee season. In that season he was given an advance of 400 000 francs and again there was a deficiency in the amount supplied, which was estimated at 172 500 francs. The appellant failed to make good these two deficiencies. He was prosecuted on a two-count charge laid under section 225, convicted and sentenced and he appealed. The appeal was argued before their Lordships Thomas, CJ, Inglis and Ekor' Tarh, JJA.

It was submitted on behalf of appellant that the respondent had failed to prove that the appellant had used the money for a purpose other than that for which it was given, that appellant had signed a promissory note admitting owing the Union a certain amount of coffee, and that there was no evidence of how much coffee the appellant was expected to deliver for the sums of money he received and that even if he failed to deliver the amount which the Union expected to receive that was not evidence to establish an offence under section 225. The respondent replied that for the purpose of s. 225 it was sufficient to show that the money received was not wholly used for its intended purpose, and that it was not the burden of the respondent to prove the other purpose for which appellant may have used the money.

The Court observed that the two principal witnesses in the case referred to

⁴⁴⁴ Criminal Appeal No. BCA/16.c/73, unreported.

the subject-matter of the charge as a debt owed by the appellant to the Union. It was satisfied that the evidence established that there was a general accounting between the two parties, both having admitted liability; that the Union unilaterally set-off its indebtedness against that of the appellant and, in order to recover the outstanding balance still owing, caused criminal proceedings to be instituted against the appellant. Delivering the unanimous decision of the Bamenda Court of Appeal, Thomas, CJ said,

“We hold very strongly that for a charge to succeed under section 225 of the Penal Code not only must the evidence positively establish that the appellant used the money for a purpose other than the agreed purpose but it must also prove *mens rea*. Section 225 does not remove the burden placed on the prosecution under section 74 of the Penal Code of proving criminal responsibility. ... Taking into account ... that money advances were given to the appellant for a specific purpose; that there was a general accounting which showed that that purpose was only partly fulfilled; that there was no evidence to show that the appellant used the money entrusted to him for any other purpose than that agreed on; and that no criminal intent was proved, we are forced to come to the conclusion that the case against the appellant has not been proved.”

The appeal was accordingly allowed and both conviction and sentence quashed. This case is somewhat odd. It does not seem to be a case of a loan or subsidy from the Union. It would appear from the facts of the case that Tumenta Teboh was an independent contractor under a contract for services to buy coffee using money advanced by the Union and then to deliver the same to the Union, a commission being paid to Tumenta for his services. The Union was his employer for that specific purpose and he was under its control as to what he must do, i.e. to buy and deliver the quantity of coffee the money advanced to him would fetch. It is doubtful to the extreme that this is the sort of case contemplated by the lawmaker as should fall within the mischief of s. 225. The relationship between the Union and Tumenta was purely a contractual one and any breach of that contract was properly redressable by a civil, not a criminal, action.

In a prosecution under section 225 the wise prosecutor would specify the nature of the money advance made, i.e. he would ascertain and clearly state in the charge whether the money advance is a loan or a subsidy. It cannot be both at the same time. Where it is a subsidy no question of repayment or an accounting arises, as the recipient of the money advance incurs no debt. The donor's interest is not that the money should be repaid but that it should be used for its agreed purpose, so that if it is not so used the recipient would thereby have committed an offence under section 225.

In the case of a loan, however, repayment of the money advanced is expected. Depending, on the agreement between the parties, the repayment

may take the form of a return of an equivalent sum of money or the return of something equivalent to the money lent. Concretely, in the case of a loan the borrower incurs a double obligation: to use the money for the agreed purpose of the loan, and to repay the loan (with or without interest, as the parties may have agreed) in cash or otherwise. If the money be not used for the agreed purpose the borrower would have committed an offence under section 225 even though the loan remains payable. If only part of the money be so used no offence would have been committed since it is not a requirement of the offence that the entire amount of money borrowed must have been used for the agreed purpose, but the borrower would have to account to the lender for the outstanding balance of the money.

4.5. Infringement of regulations governing standards

By section 226 it is an offence to infringe any regulation prescribing standards for any produce to be exported. The offence is punishable by fine⁴⁴⁵ and by the confiscation of the shoddy goods in question. The term 'produce' refers to agricultural and natural products collectively as opposed to manufactured goods.

This provision reinforces regulations made by the national bureau of standards (if any exists), the authority responsible for quality control and assurance. Its object is to give additional protection to foreign consumers by insisting that commodities from the country to be sold abroad to earn foreign exchange must be good in quality and presentation.

It is however strange that the insistence on quality should apply only to produce for export. A producer is thus not guilty of an offence under section 226 if his shoddy produce is for the local market!

⁴⁴⁵ From 50 000 to 4 million francs.

Offences Relating to Public Safety

Offences under this head deal with conduct which though affecting the safety of the public and may in fact result in damage to property, yet cause no bodily injury to anyone. If the impugned conduct also results in injury to another the accused may properly be charged with that offence as well.

§1. Arson

Known in old times as *incendium* (incendiarism), arson is the intentional setting of fire to property of a specific kind whether owned by the arsonist himself or by someone else. By section 227(1), “whoever sets fire, directly or indirectly, and notwithstanding that he may be the owner (a) to any place used for another’s dwelling; or (b) to any land, sea or air vehicle in which are one or more persons; or (c) to any working mine or its appurtenances” is guilty of an offence punishable by imprisonment for from 3 to 10 years and fine⁴⁴⁶.

Arson attracts a heavy penalty because damage by fire, particularly of dwelling houses, has always been regarded with abhorrence. The point is worth calling attention to that, s. 227(1) deals with the simple fact of *setting fire* to any of the specified property. If the fire set on the property results in destruction of the property the indictment should be laid under section 227(2).

Set fire to. As soon as fire is set, directly or indirectly, to any of the named type of property the crime of arson is committed. It is not a requirement of the offence that the property in question should have been gutted by the fire or burnt to ashes. Nor is it necessary that the property should have been completely consumed in the fire. The burning and consuming of any part of the property, no matter how trifling, is sufficient. Nor again does it matter that after the fire was started it was immediately extinguished. Similarly, if the property is caused to smoulder at red heat, it is still arson even though there is no actual flame; for, ‘fire’ is any burning that produces light and heat. Whether the fire was set directly or indirectly is immaterial⁴⁴⁷.

The type of device used to set the fire is also immaterial: striking a match, lighting a fire, throwing a lighted cigarette, throwing an incendiary or explosive device such as a Molotov cocktail or a bomb, manipulating electricity cables, or setting fire to hay or grass or papers or inflammable liquid or device stacked by a dwelling-house, for example.

⁴⁴⁶ From 5 000 to 1 million francs

⁴⁴⁷ *Aseh Aleh Francis v. The People* (1976), Criminal Appeal No. BCA/18.c/ 76, unreported; *The People v. Ful Peter Shey & 7 Others* (1983), Criminal Appeal No. BCA/30.c/82, unreported.

Dwelling, vehicle, mine. The law of arson applies only to three kinds of property, namely, a dwelling-house, a vehicle with at least one person inside, a working mine or its appurtenances, whether belonging to another or to the arsonist himself. It is not arson within the meaning of section 227(1) to set fire on any other kind of property (e.g., crops, plants, trees, clothes, hay, farm produce, a warehouse or store, an office building, a church, a school, a silo, etc.) or even to a vehicle, provided it had no occupant, or to an abandoned mine or dwelling place. That conduct would however be vandalism and may be prosecuted under s.316. Presumably the law of arson focuses on dwelling-places, vehicles with someone inside and working mines because, over and above the damage that may be done to the said property, there is, in the circumstances, likelihood of peril to human life.

In framing the charge the prosecution must indicate the specific property to which the fire was set. If the property in question is a dwelling house the charge has to be laid under section 227(1)(a). A dwelling or dwelling house is any place used for residence. It includes any building or structure, however flimsy, or part of a building or structure, which is for the time being kept by the owner or occupier for the residence therein of himself, his family, or servants, or any of them. It is immaterial that it is from time to time uninhabited. It is thus arson under section 227(1)(a) to set fire to any place used for another's dwelling, whether that place is owned by the arsonist himself or by someone else. The important thing is that at the material time the place was used for another's dwelling.

If **A** sets fire to a dwelling house owned by the occupier of the house or by another person, **A** is guilty of arson. **A** is equally guilty of arson if he sets fire to a dwelling house owned by himself but occupied by another such as a tenant under a tenancy agreement or a tenant at will or a tenant at sufferance. But **A** is not guilty of arson under section 227(1)(a) if he sets fire to a dwelling house he owns and occupies. Setting fire to a dwelling house that one owns and inhabits may well be indicative of some mental disorder or a step towards defrauding say an insurance company. In the latter case the conduct could, in appropriate circumstances, amount to an offence under section 318(1)(c).

In *Tiove Nsonyie Andrew v. The People* (1981)⁴⁴⁸ the appellant burnt grass around his farm. The fire spread and destroyed a dwelling house, a number of trees and crops, and a quantity of agricultural produce. He was charged with arson under section 227(1)(a) and convicted of the offence. The Bamenda Court of Appeal (Anyangwe, Arrey and Asu, JJA) quashed the conviction for want of evidence that the dwelling house had intentionally been set on fire. The defence throughout was lack of intention. It was argued that the defendant had set fire on grass around his farm merely to keep out destructive animals. The Court of Appeal reasoned that the appellant's anticipatory action

⁴⁴⁸ Criminal Appeal No. BCA/29.c/81, unreported.

by creating this rather unorthodox anti-trespasser device negated the element of intention in relation to the act complained of.

It is submitted that the prosecution should have charged the impugned conduct under section 370(4). That provision punishes anyone who, by carelessness, inattention, negligence or failure to observe regulations, causes any movable or immovable property of another person to catch fire. The penalty is however very benign, being imprisonment for not more than 10 days and a niggardly fine. The prosecution probably reasoned that this penalty was not commensurate with the loss by fire of the dwelling house and so decided to lay a charge under section 227(1)(a). But having done so the prosecution should have argued that arson under section 227 may be committed directly or indirectly and that the accused by intentionally setting fire on the grass around his farm knowing full well that it could escape and burn down his neighbour's dwelling house thereby intended, obliquely, to set the said house on fire; and further that setting fire on grass around one's farm is neither a customary nor a reasonable nor a static form of deterrence against human and animal trespassers.

A somewhat analogous case is that of *Thomas Sama v. The People* (1974)⁴⁴⁹. One night **X** peeped out of his house and saw someone flash a torch, move to a bundle of grass near his house and set it on fire. **X** called out the name of the appellant and the person with the torch ran off. **Y** who heard **X** calling out the name of the appellant came to the scene as **X** was crying out that appellant wanted to kill him (**X**). **Y** did not see the appellant but said he saw someone running away. Upon these facts appellant was charged under section 227(1)(a), convicted and sentenced to 3 years' imprisonment, and he appealed. The Bamenda Court of Appeal (Thomas, CJ, Inglis and Ekor"Tarh, JJA) allowed the appeal for want of convincing evidence of identification of the appellant as the one who set the hay on fire.

Mr. Justice Ekor"Tarh who delivered the decision of the Court said:

"The only evidence available is the evidence of the 1st prosecution witness identifying the appellant. This evidence in our opinion is vague and weak in its substance as it was most unlikely that the person seen running away from the burning grass was the appellant. It was night and the person carried a torch. It is doubtful that 1st prosecution witness could identify the appellant in the night without himself having a torch. If he called appellant's name it was more because of their previous misunderstanding. 2nd prosecution witness did not see appellant but heard 1st prosecution witness call his name. This being a criminal matter the standard of proof required by law has not been attained by the evidence of 1st prosecution witness and 2nd prosecution witness identifying the appellant as the criminal."

⁴⁴⁹ Criminal Appeal No. BCA/15.c/73, unreported.

Where the property set on fire is a vehicle with someone inside, the charge is to be laid under section 227(1)(b). The term ‘vehicle’ in this provision has the very wide meaning of any land, air or water conveyance. The meaning of the word ‘sea’ in the provision is not confined to sea properly speaking but includes river, lake, bay, lagoon, ocean, canal, etc. It should however not escape notice that setting a vehicle on fire is in law arson only if one or more persons were in the said vehicle at the time. This again shows that the mischief in the law of arson is not only damage to property but also the imperilling of human life.

Where the charge is laid under section 227(1)(c) the prosecution must show that the mine in question was a working mine at the time of the fire, that is to say, mining activity was going on in the mine at the time. It is therefore not arson to set fire to a disused or an abandoned mine. If a mine is a working mine, it is arson to set fire either to the mine itself or to its appurtenances.

§2. Destruction of dwelling, vehicle or mine

It is an offence punished in like manner as arson to *destroy* another’s dwelling, or any vehicle inside which are one or more persons, or any working mine or its appurtenances⁴⁵⁰. This provision can arguably be construed as applicable only where the destruction of any of the specified property results from arson. It is however doubtful that this construction is correct. Section 227 is entitled ‘arson and destruction’, signifying that two distinct offences are here contemplated; ‘arson’ is covered by sub-section (1) and ‘destruction’ by sub-section (2), of that section. There is therefore no compelling reason to suggest that the lawmaker intended that the destruction contemplated under section 227(2) must be by way of arson only.

It is submitted that section 227(2) contemplates damage by any method, including by arson. Whereas section 227(1) punishes the mere setting of fire to another’s dwelling, or to a conveyance occupied by one or more persons, or to a working mine or any of its appurtenances, section 227(2) punishes the destruction, by whatever means, of another’s dwelling, or a conveyance occupied by one or more persons, or a working mine or any of its appurtenances. In *Yaouba Umarou v The People & Alhaji Baba Ahmado Dampollo* (2006)⁴⁵¹, the appellant and three others, acting in concert, went to a disputed piece of grazing land at Sabga where the local people were peacefully grazing their cattle. They burnt down two huts and destroyed a fence. They claimed to be entitled to use reasonable force to abate a nuisance or expel a trespasser. The structures had been erected by second respondent, Dampollo. The four persons involved were arrested, and, inexplicably, taken across the border to

⁴⁵⁰ Section 227(2).

⁴⁵¹ Criminal Appeal, No. BCA/MS/5c/2004, unreported.

Bafoussam where they were detained and there eventually tried by the military tribunal. The charges were arson and destruction (s. 227(1)(2)), disturbance of quiet enjoyment of land (s.239), and illegal possession of firearms (apparently the excuse for the assumption of jurisdiction by the military tribunal). All four accused were convicted and each sentenced to 10 years' imprisonment. They were further adjudged liable, jointly and severally, to pay the sum of 1 500 000 francs to the second respondent. They appealed. The appeal which was heard and disposed of related only to three of the four appellants. The present appellant had escaped from lawful custody while the appeal was pending hearing and determination. Appellant was later apprehended and his appeal eventually relisted. Held (Morfaw, CJ, President, Njilele, J, Vice President), quashing the conviction under s.239 that "the maxim *ex turpi causa non oritur actio* fits squarely in the circumstances of the present case ... particularly that it is the second respondent (Dampollo) who without regard for the law and constituted authority trespassed into the disputed piece of land." Held further, confirming the conviction under s. 227(1)(2) that the reaction to the trespass by the second respondent was disproportionate. The court invoked sections 54 and 90 of the Penal Code in favour of the appellant, substituted 3 years' imprisonment plus a fine of 5 000 francs suspended for three years for the sentence that was passed by the trial court, and dismissed the civil claim.

The offence of destruction under section 227(2) does not duplicate the similarly named offence of destruction under s. 316 first because the interest protected is 'public safety' in the former and property per se in the latter, and secondly whereas section 227(2) is concerned with specific kinds of property section 316 is concerned with any kind of private property in general.

Destruction is a much stronger word than damage. To damage a thing means to cause it to lose its value, attractiveness or usefulness. But to destroy a thing is to damage it so badly that it no longer exists, works, etc. Destruction necessarily involves damage, but damage does not necessarily involve destruction. The notion of damage necessarily includes any deleterious change in the condition of property. If a person spreads jam on someone's sofa, or puts salt in his petrol, or adds too much water to his milk, or defaces his wall with aerosol paint, or urinates on his car seat, or lets the air out of his tyre, or squashes his bouquet of roses, or walks on his manicured lawn, or tampers with his computer software, he would have damaged but not necessarily destroyed the sofa, etc.

It is submitted that under section 227(2) a dwelling is destroyed other than by arson if it is demolished or otherwise rendered unfit for human habitation. A vehicle, that is, any conveyance, is destroyed other than by arson if it is rendered completely unworkable. A working mine (or its appurtenances) is also destroyed other than by arson if it is rendered completely unworkable.

§3. Dangerous activities

A dangerous activity is one that creates *risk of bodily harm* to any person. Care is required in respect of property but more importantly in respect of the person. Section 228 therefore punishes rash conduct that affects public safety in that such conduct creates danger, not of damage to property, but of bodily injury to others albeit that no actual harm is thereby caused. For example, a person who rashly or carelessly throws a piece of hard object out of the window of a moving vehicle creates the risk of someone getting hurt by the object thus jettisoned. The thrower of the object is guilty of an offence even though no actual harm has been caused to anyone, and even though nothing untoward has occurred.

Section 228 creates several offences, for it deals with various types of conduct under the general heading ‘dangerous activities’.

(i) Failure to provide against risk of bodily harm

Section 228(1) punishes with imprisonment for from 6 days to 6 months “whoever fails properly to provide against risk of bodily harm to any person from his dangerous activities.” The prosecution must show that the accused was engaged in some dangerous activity, that is to say, an activity creating *risk of bodily harm* to another. He must go further and show that while the accused was engaged in the said dangerous activity he failed properly to provide against risk of bodily injury to any person. It is not a requirement of the offence that anyone should have been injured.

What is punishable is the failure to provide against *risk* of bodily injury resulting from one’s dangerous activities. Under section 228 it is not required that actual bodily harm should have been caused. If someone is in fact actually injured an indictment will, in appropriate circumstances, lie under s.289⁴⁵² or 290. And if the dangerous activity takes the form of rash driving and in manner laible to cause harm to any person, then the charge should be laid under section 228(2)(d).

In *The People v. Anthony Bamum*⁴⁵³ the defendant appeared in the High Court sitting at Buea, charged with unintentional killing contrary to section 289(1) of the Penal Code and reckless driving contrary to section 228(1) of the same Code. The particulars on which the two counts were founded were that the defendant, being the driver in charge of Land Rover No. CM 5725 drove same on the public highway rashly and, in consequence, unlawfully killed a named person. Endeley J. discharged the defendant on the merits holding that the indictment had been filed under the wrong section of the Code and that at the stage of writing out judgment after considering the evidence the Court could not properly amend the charge.

⁴⁵² See *The People v. Joseph Eyong* (1968) W.C.L.R. 39.

⁴⁵³ (1968) W.C.L.R. 32.

“The evidence so far adduced does not disclose an offence under this section [section 228(1)] of the law. The evidence may have disclosed an offence under section 228(2)(d) of the Penal Code but, unfortunately for the prosecution, and fortunately for the defence, that is not the law under which the defendant is charged. The Court cannot, while writing out judgment after considering the evidence adduced before it at the trial, properly amend a charge as fundamentally as altering the section under which it is filed. Section 163 of the Criminal Procedure Ordinance cannot lend legal justification to such a course. Because the evidence does not disclose an offence under count (ii) the count is accordingly dismissed and the defendant is discharged on it.”

On the first count the learned Judge held that on the facts the defendant was entitled to the benefit of the doubts that the evidence raised as to his guilt.

Under section 228(1) the accused stands trial because of his failure properly to provide against risk of bodily harm to another, a hazard created by his engaging in a dangerous activity. Failure to take necessary precautions is itself evidence of creating a risk. And whether, indeed, the accused failed to take the necessary precaution or not is a question of fact for the court of trial. In any event, the requirement of dangerous activity or risk-taking is interpreted in the subjective sense.

(ii) Rashly making use of fire, etc.

Section 228(2)(a) punishes “whoever rashly and in manner liable to cause harm to any person makes use of fire, or of any inflammable or explosive matter, or of electricity, or of any machinery.” The penalty for this offence is imprisonment for from 3 months to 3 years and/or fine⁴⁵⁴.

The provision does not criminalize making use of fire, inflammable or explosive matter, electricity or machinery, *per se*. What is criminalized is making use of any of these things rashly and in manner liable to cause harm to any person. The ‘and’ is conjunctive, so that the prosecution must prove two things here: that the accused made rash use of the fire, or explosive or inflammable matter, or electricity or machinery; and that such use was in manner liable to cause harm to a person. There is no offence under the provision if the accused made rash use of the fire etc. and in manner liable to cause harm to *property*.

iii) Rashly demolishing any construction or building

Any person who rashly and in manner liable to cause harm to anyone demolishes in whole or in part any construction or any uninhabited building, notwithstanding that he may be the owner, is guilty of an offence⁴⁵⁵. The

⁴⁵⁴ From 5 000 to 500 000 francs.

⁴⁵⁵ Section 228 (2)(b).

offence carries the same penalty as in the previous one.

Here, the law punishes the rash destruction of another's property or one's own property in circumstances involving not danger to other property but danger of bodily harm to another. The offence is committed whether the demolition of the property is in whole or in part only. The property demolished must, however, be a 'construction' or 'uninhabited building'. The demolition, rashly and in manner liable to cause harm to any person, of a building used for habitation cannot be prosecuted under section 228(1).

(iv) Rashly furnishing medical treatment

A person commits an offence if he rashly and in manner liable to cause harm to any person furnishes medical or surgical treatment, or furnishes or administers any drug or other substance⁴⁵⁶.

The medical or surgical treatment, or the administration of the drug, must have been done rashly and in manner liable to cause harm to the patient. It is unnecessary for the charge to contain an averment that the medical treatment was unprofessional or unskilled or that the drug was noxious.

It is not only persons of the medical profession (physician, pharmacist, anaesthetist, dentist, nurse) who are capable of committing these offences. Anyone, whether of the medical fraternity or not, is capable of doing so. A traditional doctor who administers a herbal cocktail rashly and in manner liable to cause harm to his patient is as guilty of an offence as a surgeon who does a surgical operation in the same rash manner or even a man who administers any drug to a friend in the same reckless manner.

(v) Rash driving

"Whoever rashly and in manner liable to cause harm to any person leads, drives, rides, stops or leaves any animal or vehicle on the public highway" is guilty of an offence and is liable to imprisonment for from 3 months to 3 years and/or fine⁴⁵⁷ Upon conviction in respect of a vehicle the court may add disqualification from holding a driving licence for up to 2 years⁴⁵⁸.

Rashly. This is part of the requisite fault element of the offence. The Penal Code does not define 'rashness' but generally the term has the same meaning as recklessness or gross negligence. By way of generalisation it may be said that rashness is the deliberate or conscious taking of an unwarranted risk. The rash person has a more blameworthy state of mind than the negligent person. He foresees that his conduct may have certain harmful or prohibited consequences but unreasonably assumes that these consequences will not

⁴⁵⁶ Section 228 (2)(c).

⁴⁵⁷ From 5.000 to 500.000 francs. Section 228 (2)(d).

⁴⁵⁸ Section 228 (4).

materialise. He chances his hand. The negligent person, on the other hand, is just a daft person. He fails to foresee a consequence that a reasonable man, that ideal exemplar the law often refers to, would have foreseen.

To drive rashly, then, is to drive recklessly; that is to say, to drive in wanton disregard for the safety of persons (and property) but unreasonably hoping that nothing untoward happens. This is deliberately or knowingly taking risks in driving.

It is rash driving for a motorist to leave his own side of the road and collide head on with oncoming traffic: *Keju Tanyi Simon v The People* (2005). It is also rash driving to enter a major road from a minor one without due caution or without respecting the priority of passage of vehicles on the major road. In *Dogmo Francis v. The People* (1979)⁴⁵⁹ the appellant who was driving a taxi suddenly came out of a private road into the main road without due precaution and because of his failure to respect the priority of passage collided with another taxi being driven on the main road, the driver sustaining injuries. He was charged with rash driving contrary to section 228(2)(d) and he pleaded guilty to the charge. The trial Magistrate admitted the guilty plea, sentenced him to 12 months imprisonment and disqualified him from holding a driving licence for a period of 36 months. He appealed to the Buea Court of Appeal (Endeley, CJ, Inglis and Gwanmesia, JJA) on the ground of sentence. It was argued that appellant should have been given the option of a fine and that the period of disqualification from driving was excessive. The Court reduced the period of disqualification from three to two years. On the other point that was argued before it the Court held that the option of a fine or a term of imprisonment does not lie with the defendant and that the question of sentence is in the discretion of a trial judge or magistrate so long as he exercises his power within the law.

Again it is rash driving to drive at full speed or to attempt to overtake on the wrong side. In *Bongadu John Mawoh v. The People* (1982)⁴⁶⁰ X, was driving on the public highway. He turned on his trafficator to indicate a change of direction to the left and slowed down to do so. All of a sudden a truck being driven by appellant came from behind and knocked the car being driven by X, forcing it to make a U-turn. The car was seriously damaged in the collision. The two persons who witnessed the accident gave evidence that appellant drove at full speed and attempted to overtake on the wrong side of the road. Appellant was convicted and sentenced. He appealed to the Bamenda Court of Appeal (Asu, Anyangwe, and Arrey, JJA) on both conviction and sentence.

Mr. Justice Anyangwe who delivered the judgment of the Court stated the general rule as to speeding as follows:

⁴⁵⁹ Criminal Appeal No. CASWP/6.c/79, unreported.

⁴⁶⁰ Criminal Appeal No. BCA/17.c/82, unreported.

“The general rule is that a vehicle should be driven at a speed which enables the driver to stop within the limits of his vision. It is the duty of a driver or rider on the public highway to keep a good lookout. He must look out for other traffic which is or may be expected to be on the road, whether in front of him, behind him or alongside of him, especially at crossroads, junctions and bends. Failure to keep a proper lookout and to drive at such a speed as would enable a driver to stop within limits of his vision is evidence of rashness.”

Speed is thus not *ipso facto* evidence of rash driving. On the facts of the present case, however, the Court came to the conclusion that had the appellant had a proper or any lookout for traffic in front of him and had not been driving at high speed, he could have avoided the collision. The Court therefore held that appellant’s conviction was merited.

In *Godfred Munah v. The People* (1981)⁴⁶¹ some students walking along the highway heard a vehicle approaching them from behind. They stepped further away from the road. But the vehicle was at such a high speed that as it went past the students it hit and injured the hand of one of them. The driver of the vehicle did not even bother to stop. The matter was reported to the police and investigations led to the arrest of appellant. He was charged with rash driving and with failure to report an accident. Appellant’s defence was an alibi. The trial Magistrate disbelieved him. He was convicted and sentenced to 2 years’ imprisonment. The appeal, which was argued before their Lordships Njamnsi, Asu and Anyangwe, JJA, turned on the alibi defence (and therefore whether the appellant was the person involved in that accident) and whether the mere occurrence of the accident *ipso facto* implied rashness.

Referring to *R. v. Johnson*⁴⁶² which was cited with approval by the West Cameroon Court of Appeal in *Uchendu & Ors v. Commissioner of Police*⁴⁶³, the Court held that it is settled law that a defendant who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer. The evidence adduced did not identify either appellant or the vehicle involved in the accident; nor was any description given which might have led to the identification of the vehicle or its driver. In the opinion of the Court it would seem the police simply picked on the appellant because of his record as the most reckless driver in town. In any event, the Court found that there was no shred of evidence whatsoever to prove rashness. In the words of Anyangwe, J who delivered the judgment of the Court, “The mere happening or occurrence of an accident is not *ipso facto* evidence of rashness. Under the section it is the antecedent acts or conduct of the driver that are material and not the results of such act or conduct.” The appeal was accordingly allowed.

In prosecutions under section 228(2)(d) the charge invariably alleges

⁴⁶¹ Criminal Appeal No. BCA/3.c/81, unreported.

⁴⁶² (1961) 1 WLR 1478.

⁴⁶³ (1965-1967) WCLR 64.

collision with another vehicle or damage to some property. The averment is surplusage. It is not a requirement under the provision that there should be a collision, or damage to property. The provision punishes the *creation of a risk to a human being* through rash driving (whether the person is in the rashly driven vehicle, in some other vehicle, or is some other road user). It does not punish injury to persons through rash driving. Nor does it punish damage to property through such wanton driving.

Admittedly, damage to property or collision with another vehicle could possibly be evidence of rash driving, and if so, will assist the court in selecting a sentence commensurate with the degree of rashness exhibited by the offence. Still, it is important to notice that the law here does not punish the unintentional damage or destruction of another's property through rash driving. It is thought that the law of torts can adequately take care of that.

It is however a summary offence to negligently or carelessly damage any telephone or telegraphic installation or apparatus⁴⁶⁴; to cause, through excessive speed or bad driving, the death or injury of any animal belonging to another⁴⁶⁵; or to cause by carelessness, inattention, negligence or failure to observe the regulations any movable or immovable property of another person to catch fire⁴⁶⁶.

In manner liable to cause harm to a person: This means that the particular activity is carried out in such a way that it creates a real or potential danger (risk) for another person. It is not a prerequisite for a conviction under the section that any person be actually hurt. It is sufficient that there was a danger or risk of someone getting hurt. Admittedly, there is always a risk in being on the road. But the law is here concerned with the sort of driving that creates a risk over and above that normally involved in road traffic. For example the 'biker' who weaves in and out of traffic riding at a lethal speed in crowded streets.

Leads, drives, rides, stops, or leaves: These verbs are five alternative, not cumulative requirements. However, 'drive' in its ordinary dictionary meaning is wide enough to include 'lead' and 'ride'. A person who rides a horse, a pedal cycle or a motor cycle, or who leads or guides cattle, sheep, goats, etc. on the public highway can properly be described as 'driving' the cycle or animals. A person therefore commits an offence if he drives a vehicle or an animal on the public highway rashly and in manner liable to cause harm to any person. For example, driving at breakneck speed, failing to observe a traffic sign, drink-driving, driving a defective vehicle, driving a dangerous animal, continuing to

⁴⁶⁴ Section R. 368 (8).

⁴⁶⁵ Section R. 369 (1).

⁴⁶⁶ Section R. 370 (4).

drive when one knows one may drop off to sleep any time ('micro-sleep'), jumping traffic lights, driving at night with headlights at full beam, driving an un-roadworthy vehicle, driving while feeling sleepy, driving knowing that one is subject to epileptic attacks.

A person is also guilty of an offence if he rashly and in manner liable to cause harm to any person stops (or leaves) a vehicle or an animal on the public highway. For example, a motorist who stops abruptly on the public highway acts rashly and creates the risk of a rear-end collision with any vehicle that could be coming behind, and the risk of harm to persons in the vehicle.

Vehicle: Under section 227 the term 'vehicle' is elastic. It refers to any air, land or sea conveyance. Under section 228(2)(d), however, the meaning of the term is narrow, for it refers to a land conveyance only. A vehicle under section 228(2)(d) means a device designed or adapted principally to travel on wheels or crawler tracks. The term ordinarily refers to what is known as a 'motor vehicle', that is to say, a self-propelled vehicle whether having pedals and an engine or an electric motor as an integral part thereof or attached thereto. But it also includes pedal cycle, horse-drawn cart, donkey-drawn cart, man-drawn cart, rickshaw, wheelbarrow, lawnmower, perambulator, invalid chair, etc. For the purpose of road traffic law however, a vehicle does not include train, air or sea craft, sleigh, and tramcar.

Public highway: A public highway is a public road; that is to say, any street, road or thoroughfare. It includes the shoulder or sidewalk of any such road, street or thoroughfare, any bridge, and any other work or object forming part of or connected with or belonging to such road, street or thoroughfare.

§4. Drink- or drug-driving

It is an offence under section 228(3) to drive any vehicle when drunk or under the influence of drugs. In contemplation of law drink-or drug-driving is 'a dangerous activity' as it creates a risk of bodily harm to others⁴⁶⁷. The offence of driving under the influence of drink or drug is constituted when a person intentionally drives any conveyance knowing he is under the influence of alcohol or under the influence of substance abuse. The prosecution must therefore prove that the accused (i) drove (ii) a vehicle (iii) when drunk or under the influence of drugs.

There is no requirement that the driving should have been on the public highway. A person commits the offence even if he drove the vehicle on a private road, or on an open space, or on water, or in the air. The expression 'any vehicle' under section 228(3) signifies that 'vehicle' has a wide meaning, in

⁴⁶⁷ Presumably a mere risk of damage to another's property does not constitute 'a dangerous activity'.

fact the same as it has under section 227, that is, any land, water or air conveyance.

Drive: To drive a vehicle means to control its movement and direction by means of the manipulation of the steering wheel or operating mechanism of the vehicle. The vehicle must be moving. One cannot drive a stationary vehicle. It is immaterial whether the vehicle moves mechanically, or as a result of efforts of manpower or force of gravity. One can drive say a motor car pushed by somebody else, or which is careering downhill with its engine switched off or with no fuel, or which is being towed by another vehicle. The driver need not necessarily be inside the motor vehicle. In contemplation of the law he is 'driving' even if he is pushing the car while manipulating the steering wheel with one hand through the car window.

If a person's brain is sufficiently active to enable him to make the complicated physical movements required of driving, he is, in contemplation of law accounted 'driving' even though he may not be functioning at high cognitive level. But if a person 'drives' in what is medically accepted as a state of severely impaired consciousness, then he is not, in contemplation of law, driving. The drunken or self-drugged canoeist, or the pilot whether of a ship or aircraft or hang-glider or hot air balloon, can be convicted under this provision.

Drink: The prosecution must show that the accused drove a vehicle 'when drunk'. It need not be shown that the accused drove like a drunken person. But it must be shown that he was actually drunk. This means proving that he was affected by liquor to a point where the skill and judgment he would normally need in order to drive the vehicle were diminished or detrimentally affected. It is not enough for the prosecution to adduce evidence tending to show merely that the breath of the accused smelt of alcohol or that the accused was unsteady in his gait or that he manifested a drunken condition by slurred speech or by boisterous or indecent conduct, or even that he was violent or that he was seen emerging from a pub, bar or night club. For, the aim of the law is not to punish people who drink a sociable glass. Scientific proof of inebriety must be forthcoming. It must be shown that the accused drank himself silly, that is to say, he consumed alcohol in such quantity that the proportion in his blood as ascertained by a roadside breath test (i.e. breathalyzer, or a laboratory test of blood or urine) exceeds the legally permissible limit.

Although it must be shown that the accused was drunk at the time he was driving, it is not sufficient merely to prove that before driving the defendant had taken a few cups. The manner in which the defendant drove, his behaviour and condition when he stopped driving (e.g., unsteady walk,

talkative, alcohol-stinking breath, slurred speech) may suggest he is drunk. But this evidence on its own is insufficient to secure a conviction. It needs to be buttressed by a laboratory analysis of the sample of the defendant's blood or urine. This requirement often entails evidential problems. The absorption of alcohol (or drug) into the bloodstream and its elimination are long and often irregular processes. If the accused is examined only some time after he has stopped driving or a long time afterwards, the test may be negative (i.e., it may show a low proportion of alcohol in the blood).

If the accused was driving when drunk it is immaterial that the drunkenness was not due to drinks. Drunkenness is drunkenness, whether it can be ascribed to the consumption of alcohol, the taking of drugs or the eating of intoxicating food (e.g. certain species of mushroom) or fruits (e.g. certain types of wild fruits, such as the 'marula' fruit, used in making soft drink cocktails).

Drugs: A person who drives under the influence of drugs is guilty of an offence just like the person who drives when drunk. It does not matter whether he was already drunk or under the influence of drugs before starting to drive or that he started driving when sober but got drunk or under the influence of drugs while at the wheels (e.g. he took drugs or some beers or some whiskies while driving).

On a charge of driving under the influence of drugs the prosecution must prove not only that the accused took some drug (orally or by sniffing or by intravenous injection), but also that he was actually under its influence. However, it does not matter whether the drug is what, scientifically speaking, is an intoxicant or whether it is a toxic drug or whether it is a drug having a narcotic effect such as narcotics in the pharmacological sense of the word or remedies with drug-like effect which may be prescribed pharmacologically (e.g. tranquillizers such as valium, anaesthetic, insulin).

Prohibited drugs include coca leaf, morphine, opium, opiates, amphetamines, barbiturates, hallucinogens (including Lysergic acid diethylamide, LSD), cannabis (dagga, marijuana, hashish, pot, Indian Hemp), cocaine, heroin and mandrax. The use or possession of any of these drugs or any dealing in them is an offence under both municipal and international law⁴⁶⁸.

Punishment: An offence, whether under subsection (2) or subsection (3) of section 228, is punishable by imprisonment for from 3 months to 3 years and/or fine⁴⁶⁹. Upon conviction under subsection (2)(d) in respect of a vehicle,

⁴⁶⁸ See: s.11 of the Penal Code; the Geneva Convention on the Suppression of International Drug Traffic (1936), the New York Single Narcotic Drugs Convention (1961).

⁴⁶⁹ From 5.000 to 500.000 francs.

or under subsection (3), the court may in addition to the penalty of imprisonment and/or fine, disqualify the offender from holding a driving license for a period of up to 2 years⁴⁷⁰. The court's power of disqualification, be it noted, is discretionary not mandatory.

Disqualification under the Code is not a sanction but a preventive measure⁴⁷¹ applied to traffic offenders. Its effectiveness is however very doubtful especially as section 36(2) provides that disqualification may not be for less than a year. It is doubtful that disqualified drivers respect the court's order for more than a few weeks. Disqualification has a more crippling effect on the offending driver than the principal penalty. As a result, many disqualified drivers tend to ignore the disqualification measure pronounced against them. They do so and generally get away with it because there is no effective method of enforcing the measure.

In *Bongadu John Mawoh v. The People* (1982) the appellant, who was a first offender, was convicted under s.228 (2)(d) of rash driving on the public highway and was sentenced to 6 months imprisonment and disqualified from driving for 18 months. On appeal to the Bamenda Court of Appeal, Anyangwe J delivered the unanimous decision of the Court setting aside the disqualification order on the ground that it was unreasonable in the circumstances. "Since on the facts of the case the appellant was a first offender and had had 25 years of faultless driving, ... the order, which has more crippling effects on him than the principal penalty, was in the circumstances unreasonable."

§5. Infringement of regulation governing explosives

Section 229 imposes a penalty of imprisonment for from 1 month to 1 year and/or fine⁴⁷² on anyone who infringes any regulation governing the manufacture, storage, transport, import or export of, or trade in explosive substances.

An explosive substance is any material such as ammunition (cartridge, bullet, grenade, shell, bomb, cannon ball and rocket) containing any noxious liquid, gas or other thing designed or adapted to explode on or immediately before impact.

This section does not punish cases of bare possession of explosive substances. Nor does it punish the mere fact of manufacture, storage, transport, import or export of, or trade in explosive substances. What the section punishes is the *infringement of any regulations* governing these activities. And whether or not there has been any infringement will depend on what the relevant regulations, if any, provide. Section 229 is thus in effect a mere penalty

⁴⁷⁰ Section 228(4).

⁴⁷¹ Section 36.

⁴⁷² From 2 000 to 100 000 francs.

provision applicable only in the absence of any penalty provided in the relevant regulation itself.

§6. Obstructing the use of public highway

It is an offence under section 230(1) to obstruct, without lawful authority, the use of any public highway or waterway. It is also an offence under the same subsection to render, without lawful authority, passage on any public highway or waterway less convenient by damaging the surface of the highway or diverting the course of the waterway, or by any erection, or by excessive use, or by use of one's own adjacent land. Either offence is punishable by imprisonment for from 1 month to 2 years.

A charge for any of these offences can properly be met with the defence that the accused had lawful permission to do the act.

If a person damages or dilapidates in any way any highway or encroaches upon the borders thereof, the charge should be laid under s.R.369 (7)⁴⁷³.

§7. Non-repair of highway

Section 230(2) is an example of an offence of omission in breach of an imposed duty. By that provision, whoever being bound to repair any highway or any work connected with it, refrains from so doing is guilty of an offence and liable to imprisonment for from 1 month to 2 years. Presumably the relevant government department, local councils and contractors bound to repair a stretch of highway or any work connected with it would be caught under this section. In the case of the relevant government department or a local council proceedings may conceivably be instituted against their respective heads, but this is most unlikely.

⁴⁷³ See also section R. 367 (15).

Offences Relating to Public Peace

In this chapter the lawmaker deals with conduct considered as primarily constituting a danger to public peace and tranquility. The offences dealt with would appear to suggest that public peace is necessarily imperilled from the mere fact of (i) people congregating in certain circumstances (sections 231-236); (ii) unlawfully possessing arms (sections 237-238) or going armed (section 248); (iii) giving vent to some forms of inconsiderate expression (sections 240-241); and (iv) indulging in certain ill-practices (sections 249-251) and nuisance conduct (sections 239, 243, 245, 247).

§1. Unlawful assembly

The name similarity between the ‘unlawful assembly’ offences (section 231) in this country and the offence of unlawful assembly in other jurisdictions is deceptive⁴⁷⁴. Section 231 does not deal with people meeting and in such circumstances of terror as endanger the public peace. The section does not require that there be an assembly at all. What is unlawful under the section is the *arrangement of*, or *invitation to*, a would-be assembly without giving such notice, as may be required by law. From this it follows that the title of section 231 seems a misnomer.

In other jurisdictions an unlawful assembly is a gathering of two or three persons if it can reasonably be found that the assembly is likely to endanger the public peace. The law of unlawful assembly under section 231 is, by contrast, not concerned with people assembling themselves together for an ill purpose *contra pacem* (‘against the peace’), though they do nothing. The section is concerned with the contravention of public order laws regulating public assemblies, public meetings and demonstrations, and the maintenance of public order⁴⁷⁵.

Section 231 deals with several so-called ‘unlawful assembly’ offences. It is an offence under the section:

- To take part in the arrangement for a meeting in any place open to the public without having given such notice as may be required by law.

⁴⁷⁴ In England, the Public Order Act of 1986 replaced the four common law offences of riot, rout, affray and unlawful assembly with three statutory offences, viz. riot, violent disorder and affray. The Act also makes extensive provision relating to threatening, abusive, insulting or disorderly conduct, to public processions and meetings, and to incitement to racial hatred.

⁴⁷⁵ On the laws relating to the maintenance of public order see Law No.90/ 055 of 19 December 1990 on Public Meetings and Demonstrations; Law No.90/054 of 19 December 1990 on Maintenance of Public Order.

- To take part in the arrangement for a meeting in any place open to the public before the expiry of any period of notice as may be required by law.
- To take part in the arrangement for a meeting in any place open to the public after service of lawful prohibition.
- To take part in the arrangement for a demonstration or procession in any place open to the public without having given such notice as may be required by law. In s.231 the word ‘or’ in the phrase ‘demonstration or procession’ is not to be construed disjunctively but as implying similarity.
- To take part in the arrangement for a demonstration or procession in any place open to the public before expiry of such period of notice as may be required by law.
- To take part in the arrangement for a demonstration or procession in any place open to the public after service of lawful prohibition.
- To issue by whatever means, before giving such notice as may be required by law any invitation to attend a meeting or a demonstration or procession in any place open to the public.
- To issue by whatever means, after service of lawful prohibition, any invitation to attend a meeting or a demonstration or procession in any place open to the public.
- To give notice liable to mislead the authorities in respect of the character or purpose of the proposed meeting, demonstration or procession.

Presumably, each of these offences is denoted as an unlawful assembly first because the object in each case is to gather people (an assembly), and secondly because the unlawfulness of the intended gathering arises from lack of the requisite permit or notice for it. Each offence is punishable by imprisonment for from 15 days to 6 months and a fine⁴⁷⁶.

Section 231, be it noted, punishes as an unlawful assembly the arrangement for or invitation to a public meeting, demonstration or procession without the requisite notice or in violation of any condition of notice or any lawful prohibition of a proposed public meeting, demonstration or procession. Giving misleading notice is also an offence. This section has often been used for political persecution and to deny the basic human right to peaceful assembly and demonstration. Such misuse of the law must be deprecated. It is important to emphasise the point that the section deals only with the question of notice. It does not criminalise public gatherings or even public gatherings without a permit to assemble (as opposed to giving of notice of such

⁴⁷⁶ From 5 000 to 100 000 francs.

gatherings). Since the section punishes only ‘arrangement’, ‘invitation’, and ‘misleading notice’, it follows that participation in any public gathering called without having given the required notice or in defiance of a ban on the holding of the gathering is not within the purview of the section. The conduct can however be prosecuted under the public order legislation or, in appropriate circumstances, under s.232 or s.R.369 (5).

In *Fai Ndichangong & 3 Others v. The People* (1973)⁴⁷⁷ count 1 of the two-count charge against the appellants alleged that they “took part in the organization of a meeting and demonstration in a place open to the public, to wit, ‘Ngiri Society’ after service of a lawful prohibition by prefectorial order ... and thereby committed an offence contrary to and punishable under section 231(a) of the Penal Code.” Count 2 recited that the appellants “did after a lawful prohibition of the ‘Ngiri Society’ summon the said Society to assemble and thereby committed an offence contrary to and punishable under section 231(b) of the Penal Code.” The learned Magistrate in a reasoned judgment found the appellants not guilty of the offences charged. He nevertheless found them to be “aware of the law imposed on the activities of ‘Ngiri’” and to have violated “the provisions of the Prefectorial order.” On that score he convicted the appellants under section R. 370(12) of the Penal Code, having had regard to section 179(2) of the Criminal Procedure Ordinance. He accordingly sentenced each of the appellants to a fine of 25 000 francs or to a term of imprisonment of one month with hard labour.

The appeal taken against conviction and sentence came before their Lordships Thomas, CJ, Inglis and Ekor”Tarh, JJA, sitting in the Bamenda Court of Appeal. Held, after listening to the arguments of counsel on both sides, and allowing the appeal, (i) that the Prefect went outside his competence when he made the infringement of his prefectorial order punishable under the Ordinance dealing with state of emergency; (ii) that the appellants were charged with an offence contrary to the prefectorial order, and the charge stated that the offence was punishable under a section of the Penal Code which had no relation to the prefectorial order, thereby abandoning the provisions made in the prefectorial order for its infringement; (iii) that the error in not charging the offence under the correct section of the law was serious and therefore resulted in the Magistrate misdirecting himself; and (iv) that the sentence was excessive.

§2. Riot

The offence of ‘riot’ in the Code is a homonym of ‘riot’ in the criminal law of some other jurisdictions. For, the law of riot in the Code is more akin to the crime of ‘rout’, than to its namesake, riot, in other jurisdictions. Riot in ss.232 and 233 need not be *in terrorem populi* (‘to terrify the populace’). There need be

⁴⁷⁷ (1971-1973) UYLR 97.

no actual violence or force. Striking terror into the people (such as terrifying them, committing personal violence, using threatening or hate speech, making turbulent gesture) is not necessary.

‘Five or more persons in manner likely to disturb the public peace’: By section 232(1) a riot is an assembly on the public highway of ‘five or more persons’ in manner liable to disturb the public peace. Any gathering whatever, on the public highway of at least five people is a riot if it is in manner liable to disturb the public peace. The number five is of course arbitrary for that number holds no magic; and in England, for example, the required number of persons for the same offence is ‘twelve or more persons’. The law however considers that a gathering of any such number of persons is attended with the danger of tumultuously disturbing the public peace.

If five or more persons assemble in manner liable to disturb the public peace, it makes no difference whether the act that the persons assembled intended to do is lawful or unlawful. If six persons assemble themselves together for the purpose of obtaining any particular end, and conduct themselves in manner liable to disturb the public peace, this is in itself riot within the meaning of section 232, whether the end and object proposed be a just and legitimate one or not.

If they assemble themselves together in the first instance for an innocent purpose and then afterwards, for whatever reason, conduct themselves in manner liable to disturb the public peace, for example, by using or threatening unlawful violence, shouting hate speech, using inflammatory language, inciting or stirring racial or ethnic hatred, throwing stones or other missile, firing a gun in the air or in whatever direction, swinging a knife or machete or stick, they are guilty of riot as if their first coming had been on such a design because their subsequent conduct is in no way extenuated by their having met at first innocently and peacefully.

There is no requirement that the five or more persons present together should have gathered for a common purpose, or that it is the conduct of all of them taken together that should be in manner likely to disturb the public peace. Nor is it necessary that all the five or more persons should each be criminally responsible.

Thus, it matters not that each of the ‘five or more persons’ gathered had a different purpose or motive for being present together. It matters not that only the conduct of one or two of those assembled was in manner liable to disturb the public peace. The law looks at the body of persons assembled and not at the individual persons assembled; it looks at the wood, not the trees. Those in the gathering but who did not conduct themselves in manner liable to disturb public peace are nevertheless guilty by association with the others; at least they are participants in the offence as accomplices because their presence

constitutes aiding and abetting. It is also for this reason that the presence among the ‘five or more persons’ of individuals who lack criminal responsibility will not save the others from a conviction even if it was the conduct of those ones that was liable to disturb public peace. Furthermore, those individuals are counted in determining whether or not those present together are ‘five or more’.

The ‘five or more persons’ assembled need not form a cohesive group. Nor need they be present pursuant to an agreement to come together. Consequently, they may be assembled purely by ‘accident’ or merely by coincidence. However, the requirement of ‘assemble’ suggests some element of the people being in contact with each other or being in reasonably close proximity with each other in a particular place.

Public highway: The law of riot is predicated on the fact that the law recognizes no right of public meeting in thoroughfares, for these are dedicated only for public passage and re-passage. The requirement of ‘public highway’ clearly indicates that riot is capable of being committed only on a public road. It is not capable of being committed in any other public place, or on a private road or other private place such as at factory premises, in a club, in an educational institution, in someone’s home, at a nightclub.

Failure to disperse on the first call of the proper authority: Since a riot, armed or unarmed⁴⁷⁸, is conduct that is merely *liable* to disturb (as opposed to even threatening) the public peace, it is punishable only when the rioters fail to heed a command in the name of the law to disperse. The police are empowered to use such force as is reasonably necessary to suppress a riotous assembly. In using such reasonable and necessary force a peace officer is not liable in any criminal or civil proceeding for having by the use of such force caused harm or death to any person⁴⁷⁹.

Thus, by section 232(2) whoever takes part in a riot and does not withdraw on the first call of the proper authority is guilty of an offence. It matters not whether the accused first assembled with others or whether he joins others already assembled. In either case he has ‘taken part’. However, the offence is not consummated by the mere fact that the accused took part in a riot. It is consummated by the fact that in addition to taking part in the riot he failed to withdraw on the first call of the ‘proper authority’⁴⁸⁰. A riot therefore becomes

⁴⁷⁸ A riot is described as unarmed when none of the assembled persons bears a weapon, and it is armed when one or more of the assembled persons bears a weapon, open or concealed (section.233). A weapon is an arm properly so-called and any other article carried with intent thereby to inflict bodily harm or material damage.

⁴⁷⁹ Schedule III (B), sections 63 and 64.

⁴⁸⁰ The expression ‘proper authority’ refers to a judicial officer, a law officer, an officer of police, or a commissioned officer of the armed forces. See, Schedule III (b), section 62.

a punishable offence only from the moment the rioters refuse to disperse on being ordered to do so peacefully by the proper authority.

Penalty for unarmed, armed and nocturnal riot: Regarding unarmed riot, if a rioter refuses to heed a first call to withdraw he is liable to imprisonment for from 15 days to 6 months even though he afterwards withdraws from the riotous mob⁴⁸¹. If he completely ignores the order to disperse peacefully and continues to take part in the riot until it is forcibly dispersed, he incurs the penalty of imprisonment for from 30 days to 12 months⁴⁸². The penalty becomes imprisonment for from 6 months to 4 years in the case of a nocturnal riot⁴⁸³.

Regarding armed riot, section 233 (1) punishes with imprisonment for from 3 months to 2 years (i) any rioter who himself bears any weapon, and (ii) any rioter who does not withdraw on the first call of the proper authority. A person who takes part in an armed riot in the day and who, ignoring an order to disperse, continues to participate in the said riot until it is dispersed by force is liable to imprisonment for from 2 to 5 years⁴⁸⁴; and if the armed riot was at night the punishment is imprisonment for from 4 to 10 years. Anyone taking part in an armed riot in the day during which a weapon is used is punishable by imprisonment for from 5 to 10 years; and if the incident took place at night the punishment is imprisonment for from 10 to 20 years⁴⁸⁵. On conviction for an offence under section 233 the court may also impose the forfeitures described in section 30.

Defence: Self-defence would be available as a credible defence. Further, the offence is not consummated if the number of persons assembled is less than five or if the assembly of more than five persons is in a place other than a public highway; or if objectively the assembly of the five or more persons was not in a manner liable to disturb the public peace.

§3. Seditious cries

Sedition was known under Roman law as *crimen laesae venerationis*, that is to say, the impairment of the dignity of the head of state. The offence required proof of *animus hostilis*, that is, a hostile intention or ill-feeling.

By section 235 of the Penal code, whoever in any place opened to the public utters any seditious cry or song commits an offence punishable by

⁴⁸¹ Section 232(2).

⁴⁸² Section 232(3).

⁴⁸³ Section 233(4).

⁴⁸⁴ Section 233(2).

⁴⁸⁵ Section 233(2)(4).

imprisonment for from 8 days to 1 month and/or fine⁴⁸⁶.

Sedition means words or action hostile to the established authority of the country; words or action intended to make people rebel against the authority of the state. It involves actively urging the unlawful overthrow of the government⁴⁸⁷. Section 235 however only punishes oral sedition committed in the form of ‘cry or song’. The section is inapplicable to seditious actions, seditious publications and seditious speeches.

‘Seditious cry or song in a place open to the public’: To sustain a charge under the section the prosecution must prove that a ‘song’ was sung or a ‘cry’ was uttered by the accused with a seditious intention. Proof of sedition involves proof of an intention to promote feelings of ill-will and hostility between different communities in the country and also proof of an intention to incite to violence or to public resistance or defiance for the purpose of disturbing constituted authority. The prosecution must further show that the ‘cry or song’ was uttered ‘in a place open to the public’. A place open to the public is any public or private place to which the public are entitled or permitted to have access either without any condition or upon condition of making payment, or gratuitously.

The occasion at which the cry or song was uttered is immaterial. But it must be shown that there were people in the place open to the public at the time the cry or song was uttered. The gravamen of sedition is that people are urged to rebel against the authority of the state. It is therefore not sedition for a person to stand, alone in a place open to the public and utter a seditious cry or song. The seditious minstrelsy in public of a lone minstrel is beyond the reach of section 235. Similarly the public display of seditious words on the Internet (email, facebook etc) or by SMS is also beyond the reach of the section. The section intends and must be understood as intending, the

⁴⁸⁶ Of from 2,000 to 50,000 francs. Section 235.

⁴⁸⁷ The great English Judge, Stephen J defined a seditious intent as understood under English common law as “an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs, or successors, or government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her majesty’s subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection among Her Majesty’s subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.” However, it is not sedition to show that “Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite Her majesty’s subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of Her majesty’s subjects.” In *R. v. Burns* (1886) 16 Cox 355, Cave J concurred with these authoritative propositions of the law by Stephen J.

presence of people in the place open to the public at the time the seditious cry or song was uttered. But the person uttering the seditious cry or song need not be there physically present. It is sedition if the seditious cry or song is uttered in a compact disc, a broadcast whether on the Internet or radio or TV, a video recording or a cassette and then played back to an audience in a place open to the public. It is not an ingredient of the offence that the people present should have given ear. The offence is consummated as soon as the cry or song is uttered.

Since sedition excites disaffection, ill-will, hatred, contempt and hostility against the government as by law established, it may provoke civil commotion or insurrection thereby endangering the public peace. For this reason uttering a seditious cry or song is considered an offence against public peace.

Defence: In a way both the law of seditious cries and the law of seditious libel are inconsistent with freedom of speech and of political opinion. Subject to the law of libel, and provided tumult is not excited, every citizen has a right to give every public matter a candid, vigorous, full and free discussion. There is thus liberty to show that the government has been misled or is mistaken in its measures, to point out errors or defects in the government or constitution, to excite people to attempt by lawful means to bring down the government, to deride the constitution or to advocate its lawful alteration; provided the advocacy is not calculated to disturb the tranquility of the state.

Reasonable criticism, however strong, is therefore lawful. In *D.P.P. v. Obi*⁴⁸⁸ the Court declared that,

“a person has a right to discuss any grievance or criticize, canvass and censure the acts of Government and their public policy. He may even do this with a view to effecting a change in the party in power or to call attention to the weakness of a Government, so long as he keeps within the limits of fair criticism. It is clearly legitimate and constitutional by means of fair argument to criticize the Government of the day. What is not permitted is to criticize the Government in a malignant manner ... for such attacks, by their nature tend to affect the public peace.”

Publication of stinging criticism or ridicule of public officials, is not a threat to law and order, let alone treason, and therefore does not amount to seditious libel.

It is noteworthy that these propositions are more apposite to the law on seditious libel than the law on seditious cries.

⁴⁸⁸ [1961] 1 All N.L.R.186

§4. Depredation by band

By section 236 (1), whoever as a member of an assembly or band, and by open force, plunders or damages any movable or immovable property is guilty of depredation and incurs a penalty of imprisonment or even death in certain cases. In order to secure a conviction under the section the prosecution must show that the accused (i) was a member either of an assembly or a band, (ii) used open force, (iii) either plundered or damaged, and (iv) acted against movable or immovable property.

Member of an assembly or a band: It must be shown that the accused was a member of an assembly or a band. But the prosecution need not show that the accused is a registered, card-bearing or uniform-wearing member of the group. A person is a member of an assembly or a band if at the time of his apprehension he was among those who had confederated together. The word 'assembly' connotes an unorganized grouping of people, as when people congregate on their own spontaneously or at the behest or call of someone. A 'band', on the other hand, supposes an organized group of people doing something together with a common purpose; such as a marauding gang, a group of dissident soldiers or policemen, a neighbourhood watch or vigilante group, a Robin Hood group, a guerilla group. Whether the assembly or band is lawful or unlawful is of no moment.

Open force: The plunder or damage must be by 'open force'. This somewhat vague phrase probably means only that there has to be violent physical action carried out in public. It makes no difference whether the display of open force took place in the day or at night. For, plunder or damage does not cease being such simply because it may have been done under cover of darkness.

Plunder or damage: 'Plunder' and 'damage' are alternative requirements. Plunder means loot or pillage. For example, a person plunders if he steals goods from a place, especially during time of war or civil commotion. On the other hand, damage has the same meaning as depredation, that is to say, the destruction of property, whether partially or totally caused, by an attack on it. The destruction is always *in situ*, involving no asportation. The method of attack used is of no importance: by fire, such as setting the property ablaze by using an incendiary device; by flooding the place, by physical damage such as smashing windows and doors or ripping off fixtures and appurtenances; by bulldozing houses; by cutting down trees and crops; or by defacement such as smearing paint or writing graffiti on the property.

Any property: The property plundered or damaged may be movable or immovable. It matters not whether the property damaged or plundered

belongs to the offender himself or to someone else, and whether it is situated in an urban or a rural area.

Punishment: The penalty varies, depending on whether the offence was committed in peacetime or in a time of some public emergency. It is imprisonment for from 10 to 20 years if the offence was committed in normal peacetime; life imprisonment if it was committed during a state of public emergency; and death if it was committed in time of war (whether an inter-state or an intra-state war)⁴⁸⁹. These very stiff penalties would suggest that this is one of those offences that belong to the realm of traditional morality.

State of emergency or siege: Under the constitution the President is empowered to declare, if he decides that the circumstances prevailing in the country or any part thereof so warrant, a state of public emergency or a state of siege and to make such consequential regulations as in his opinion are necessary for the protection of national security, public safety and the maintenance of law and order.

State practice shows that a state of public emergency (localized or countrywide) is likely to be declared in cases of a national disaster or calamity (e.g., earthquake, flood, tsunami, drought, famine, fire, pestilence, escape of toxic gas) or threat to the constitutional order (e.g., an abortive coup, an insurrection, mass civil disobedience). A state of siege (also known as a state of martial law or state of national defence) is a much serious state of affairs. Again, state practice shows that it is usually declared when there is a grave peril threatening the life, independence, institutions and territorial integrity of the nation (e.g., civil war, revolutionary uprising, military intervention by a foreign power, an invasion whether by a foreign power, extra-terrestrials, a band of mercenaries, or a group of insurgent nationals from abroad).

§5. Arms and ammunition offences

The law regulating the manufacture, sale, purchase, possession, handling, distribution etc. of arms and ammunition is to be found in particular legislation. Sections 237 and 238 deal with such danger to the community as the manufacture, export, possession, transfer, sale or carriage, without license, of lethal weapons may present.

5.1. Possession of arms

Section 237 creates not only offences relating to ‘possession’ and ‘carriage’ of arms and ammunition, but other offences as well. The title ‘possession and carriage of arms’ would therefore not seem apposite.

Subsection (1) of the section punishes with imprisonment for from 3

⁴⁸⁹ Section 236(1)(2)(3).

months to 1 year and/or fine⁴⁹⁰, anyone who, without such permission as may be required by law (i) manufactures, or (ii) exports, or (iii) keeps, or (iv) transfers, or (v) sells, any firearm or any ammunition.

A person is guilty of an offence under this section only if the conduct or activity was 'without such permission as may be required by law'. A person cannot be prosecuted under the section if no law requires permission to be obtained for carrying out the particular activity concerned.

If a person 'keeps' firearm or ammunition he is necessarily in possession of the same. He can 'keep' it even though he does not have physical custody of it nor has it in his home; it is enough that he has control of it, as, for example, where he deposits the article at the home of a friend or relative for safe custody. But a person does not 'keep' if he has just the barest custody, as where an article is temporarily delivered to him for some purpose or where he is entrusted with it for temporary safekeeping.

The 'keeping' must of course be intentional i.e. it must be shown that the accused knowingly kept the article. The accused is not liable if the firearm was slipped into his pocket. He is not liable if the firearm or ammunition was planted or left in his car or office or home unknown to him. But he is liable if the firearm or the ammunition was delivered at a designated place, in response to a request by him and it makes no difference that he was unaware that delivery had actually been made at his home or other place indicated by him. Similarly, the prosecution does not have to prove that the accused knew that the article kept was a firearm or ammunition within the relevant meaning of those terms. The offence of keeping a firearm or ammunition must be construed as one of strict liability as to the nature of the article kept.

Since the rationale for the offence is danger to the community posed by the unlicensed dealing with arms and ammunition, these terms, as used here, necessarily bear a wider meaning. A firearm is an arm properly so-called, that is to say, a portable gun of any sort such as a rifle or revolver, including a shotgun, an air weapon and an imitation firearm adapted as to be readily convertible into a firearm. It is also any lethal barreled weapon of any description from which a shot, bullet or other missile can be discharged. It is further any weapon designed or adapted to discharge any noxious liquid, gas or other thing, or any component part of such weapons, or any accessory to such weapons designed or adapted to diminish their noise or flash⁴⁹¹.

Ammunition is any cartridge or percussion cap fired from weapons or thrown at a target, e.g. bullets, bombs, or grenades. There is no good reason why the term should not include a shotgun cartridge or blank cartridge as well as ammunition for an air weapon.

It is also an offence under s.237 (2) incurring a penalty double that for an

⁴⁹⁰ From 50 000 to 300 000 francs.

⁴⁹¹ Cf. the English Firearms Act 1968, s. 57(1).

offence under subsection (1), for anyone to carry any firearm outside his residence, without such permission as may be required by law.

It is well to bear in mind that certain weapons and ammunitions are prohibited weapons or ammunitions in the sense that they will not normally be put to legitimate use, except by the armed forces. Examples of such weapons or ammunitions are a rocket launcher or a mortar for projecting a stabilised missile, a weapon for the discharge of noxious liquid or gas, a self-loading or pump-action smooth-bore gun or rifle, a firearm that can successively discharge two or more missiles without repeated pressure on the trigger, a dum-dum bullet (i.e. a cartridge with a bullet designed to explode on or immediately before impact), ammunition containing noxious liquid or gas, a grenade, a bomb, a guided missile, etc.

Subsection (3) creates an offence of accessoryship by negligence. It provides that whoever delivers any firearm or ammunition to any person without ascertaining that he is licensed to keep it shall be punished as accessory to the person to whom the firearm or ammunition was delivered.

Upon conviction for an offence under s.237 the court must order confiscation under s.35. On subsequent conviction within the meaning of s.28 the court may impose the forfeitures described in s.30 and order closure of the establishment to whatever use it may be put⁴⁹².

5.2. Dangerous carriage of arms

Section 238 creates and punishes what it terms 'dangerous carriage of arms'. A person is guilty of that offence if he bears any weapon in a place open to the public in manner liable to disturb the public peace or to alarm any person.

Weapon: It is no answer to a charge under s.238 that the accused is licensed to bear arms. Whether or not he is licensed to bear arms is immaterial. 'Weapon' is defined in section 117 and that meaning is what is to be assigned to that term in section 238. Section 117 defines a weapon as including both an arm properly so called and any other article carried with intent thereby to inflict bodily harm or material damage.

This is notoriously a wide and vague definition, at least for the purpose of section 238, though perhaps not for the purpose of sections 116(d), 233(1) and 320(1)(b). In the first place, 'an arm properly so called' is any kind of gun or firearm that fires bullets or shells or gun-powder from a metal tube, e.g., a rifle, a shotgun (be it a single or double barrel), a machine or submachine gun, a pistol, a revolver. Secondly, since virtually any article or object or thing can be used to inflict bodily harm or material damage, it follows that a 'weapon' also includes not only objects designed for use as a weapon (such as swords, spears, bows and arrows, daggers, flick knives, bayonets, sheath knives, bombs,

⁴⁹² Section 237 (4).

grenades, land mines or other explosives) but objects and things which though not designed for such use may be intended to be used for injuring people or damaging property (scissors, screw driver, cutlass or machete, kitchen or table or pocket knife, fork, glass, brick, stone, broomstick, wand or stick, iron bar, carpenter's tool, acid, cold or boiling water, fire, noxious gas or liquid, umbrella, tennis racket, shoe, bottle, razor blade, pen, rope, or even needle).

In *Clement Tanke Ndifor & 52 Others v. The People* (1972)⁴⁹³ villagers from Nkwen encroached on land occupied by the people of the contiguous village of Bambili and, using machetes and sticks damaged some cairn demarcating the boundary between the two contiguous villages. They were arrested and prosecuted on a three-count charge, to wit, dangerous carriage of arms (s.238), disturbance of quiet enjoyment (s.239), and destruction of boundary marks (s.317 (a)). On the charged preferred under s.238 the Bamenda Court of Appeal (Thomas, CJ, Inglis and Ekor⁵Tarh, JJA) held, (Thomas, CJ delivering the unanimous decision of the Court) that farm implements (in this case machetes, hoes, and sticks) were weapons for the purpose of the section.

It follows from the very wide meaning of weapon in s.238 that virtually every person in the country, the just as well as the unjust, could prima facie be found guilty of 'dangerous carriage of arms'. However, there are two matters in the definition of the offence that should not escape notice. A weapon is conceived as any 'article', that is to say, a chattel, an inanimate object. This means that an animal (e.g. a guard dog), a bird (e.g. a hawk), a person's fist, nails, hands, feet, or teeth do not come within the meaning of 'weapon' even though they may be used to inflict serious bodily injury. Furthermore, a weapon is an object that can be carried or borne by an individual. It is a movable object that is portable and therefore manageable or controllable. Thus although a tank, an artillery piece, and a missile for example are all weapons for the purposes of the laws of war, they are not weapons within the meaning of section 238.

Place open to the public: In *Clement Tanke Ndifor* it was said that the question regarding what constitutes a place open to the public is one for the court to determine. There should be no difficulty in making that determination. A place open to the public is obviously any public place to which the public have access whether gratuitously, on payment of a fee, or on some other condition, or ordinarily.

In manner liable to disturb the public peace: The mere bearing of arms is in itself not a dangerous thing to do. But it becomes 'dangerous' if the arm is carried in manner liable either to disturb the public peace or to alarm any

⁴⁹³ (1971-73) UYLR 83.

person. When is public peace liable to be disturbed by the fact of carrying arms? This is of course a question of fact for the court of trial to determine taking into account circumstances such as the following: the number of persons carrying the arms, the type of weapon carried and whether it was concealed or visible, the place where and time when the weapon was carried, the mental state of the person carrying the weapon (composed, excited, insane, restless), any accompanying gestures (e.g. pointing the weapon at someone or into a crowd, firing a shot in the air) or words (e.g. verbal threats or violence), the local traditional custom, and the occasion during which the weapon was carried.

In some traditional communities here it is customary to attend certain functions (e.g. funerals, coronations and other ceremonies) or even to go about one's daily business bearing weapons such as a shotgun, machete, sword, dagger, wand, knob stick, or even spear. These are borne either as a sign of manhood, manliness, or as part of a man's traditional dressing gear, or for use in defence of self, another or property. Seemingly such carriage of arms is considered as not liable to disturb the public peace and thus does not constitute the crime of dangerous carriage of arms. The conduct, like that of the village gunsmith who makes 'native' shotguns (i.e., muskets or Dane guns) is wisely never prosecuted.

In manner liable to alarm any person: The test to be applied here is a subjective one. It is immaterial that a person of reasonable firmness and courage would not be alarmed. It is sufficient that the conduct was likely to (not that it actually did) cause apprehension to a third party bystander, however foolish or timid he might be. Presumably, the alarm or fear in question must be fear for immediate personal safety. If a number of persons in a concerted action confederate together in a place open to the public intending to further a common purpose and some of the number bear weapons in manner liable to disturb the public peace or to alarm anyone, those who carried no weapons are equally as guilty of dangerous carriage of arms as the others, or guilty at least as accessories⁴⁹⁴.

Punishment: The penalty for the crime of dangerous carriage of arms is imprisonment for from 3 months to 2 years and/or a fine⁴⁹⁵.

§6. Disturbance of quiet enjoyment of land

Section 239 makes it an offence for any person to enter, in manner liable to disturb the public peace, upon land quietly enjoyed by another.

⁴⁹⁴ *Clement Tanke Ndifor.*

⁴⁹⁵ Of from 50.000 to 300.000 francs.

Enters: There must be an entry upon land quietly enjoyed by another. In *Etoh Rudolf Makumba v. The People* (1978)⁴⁹⁶ the appellant and one Dickson Esemé were owners, through inheritance, of land that happened to be adjacent to each other but without proper demarcation between the two tenements. Shortly after a proper demarcation had been made Dickson Esemé found some women farming on his land and believing they were doing so through the appellant's procurement he made a complaint to the police. The appellant was arrested and charged with 'disturbance of quiet enjoyment' contrary to section 239. He was found guilty. On appeal to the Buea Court of Appeal (Endeley, CJ, Njamnsi and Monekosso, JJA) held, Njamnsi, J delivering the judgment of the Court, that the words "whoever ... enters upon land" mean that the person must physically step his foot upon the land which he is alleged to have trespassed into and that since the appellant never did so he cannot be properly convicted of the offence of disturbance of quiet enjoyment; and that since s.239 is an offence involving *mens rea* the appellant cannot be vicariously liable for committing that offence through the agency of the women found farming the land.

The soundness of this decision may be doubted. If **A** sends his agent **B** to enter upon another's land and **B** does so, why should **B**'s entry not be attributed to **A** since **B** is merely acting as **A**'s agent? *Qui facit per alium facit per se*. (He who acts through another is deemed to act in person, e.g. a principal is liable for the acts of his agents.) On principle there has been a constructive entry upon the land by **A**. Moreover, not only has **A** caused the *actus reus* of the offence he also possesses *mens rea* in the sense that he knows the facts constituting the offence. It is hardly a convincing answer that since the offence of disturbance of quiet enjoyment of land is an intentional offence the principal cannot be 'vicariously' liable for his servant's entry upon the land ordered by him. The question of vicarious liability does not arise here.

A is not being held liable for the conduct and the criminal intention of **B** (as **B** might well argue that he had no criminal intent). **A** intended to enter upon the land and he did so through the instrumentality of his agent, **B**. In cases of this nature the wise prosecutor will charge **A** as an accessory and **B** as principal offender. If **B** successfully argues that though he entered the land intentionally he lacked the criminal intention to disturb another's quiet enjoyment of the land as he reasonably believed the land in question belonged to **A**, **A** the apparent accessory becomes the principal offender and would thus be convicted on the sound reasoning that **B** was no more than his instrument. It is therefore inaccurate to say that **A** is liable for **B**'s act. The liability created by the statutory verb 'enters' is not vicarious. The section applies to the person who enters, and this, on principle and on the clear balance of authority, includes the person who enters through the innocent agency of another.

⁴⁹⁶ Criminal Appeal No. CASP/11.c/78, unreported.

This case may be contrasted with that of *Tita Phillip Andangfung v. The People & Ngentan Juliana Asanga* (2001)⁴⁹⁷. In 1972 Ngentan Juliana Asanga bought a piece of land in Bambili from the appellant and took possession of the land by making a foundation on it for a house. She applied and obtained a land certificate over the land and boundary beacons were planted on it to demarcate her land from adjoining pieces of land. When she wanted to erect a house on the foundation she had made the appellant prevented her from doing so. He defied various injunctions by the village council, the police, the district officer and the land consultative board to keep off the land. In fact he displaced the boundary pillars planted on the land. He sent in women who destroyed the foundation on the land and the eucalyptus trees and raffia palms that had been planted on it.

Appellant was arrested and charged with disturbance of quiet enjoyment (s. 239), destruction of boundary marks (section 317(a)), harvesting the eucalyptus and palm trees (section R. 368 (5)), and destruction of a foundation (section 316(2)). He was convicted on all four counts and the conviction was confirmed on appeal. Delivering the unanimous decision of the Bamenda Court of Appeal (Bawack, Tume, Wacka, JJA), Tume J said:

“We hold that ... 2nd Respondent [Juliana Asanga] was in possession of the land and had quiet enjoyment of it. We equally hold that the Appellant’s act of sending women to invade the land in 1986 and in doing so to prevent the 2nd Respondent from continuing her building project over it, fulfilled the other important ingredient of an offence under section 239 of the Penal Code namely entering the land in a manner liable to disturb public peace.”

Going by the decision in *Etoh Rudolf Makumba*, the appellant in the above case should have been set free because he did not enter the land himself but sent women there who did the entry and destruction. *Etoh Rudolf Makumba* must be taken to have been wrongly decided. The learned Justices in *Tita Phillip Andangfung* were on firm legal grounds when they decided the case the way they did.

If **A** ‘sells’ to **B** part of land quietly enjoyed by **C** without any entry by **A** upon the land, **A** cannot properly be convicted under section 239. Nor can he be properly convicted under that section if after ‘selling’ the piece of land in question he peaceably enters and carries out the necessary measurements of the area he ‘sold’ out. The reason is that a peaceable entry and without the use of force cannot be said to be one that is in manner liable to disturb the public peace. But if in order to sell part of land quietly enjoyed by another a person enters thereon, carries necessary measurements of the parcel of land to be sold and there plants trees to demarcate the area, he will be guilty of an offence

⁴⁹⁷ (2002) 1 CCLR 1-123 Part 9, p. 99.

under section 239. It was so held by the Bamenda Court of Appeal (Nyo' Wakai, CJ, Njamnsi and Anyangwe, JJA) in *Henry Nji Tchezama v The People* (1983)⁴⁹⁸.

There is no transgression of section 239 (though an attempt could lie) if a man either by mere speech or conduct, but without entry, gives the person in possession of the land, which he claims, cause to fear that he will do him some bodily hurt, if he will not give way to him; or if, without entry, he merely causes terror by arming himself or by carrying with him a number of friends, agents, relatives or tribesmen even in such a manner as plainly indicates a design to back his pretensions by force.

In manner liable to disturb the public peace: The entry must be in manner liable to disturb the public peace. The question is not whether the entry was lawful or unlawful. Even a lawful entry can fall within the mischief of the provision if it is done in manner *liable* to disturb the public peace. An illustration of this point is the case of *Tita Gabriel Akum v The People* (2007)⁴⁹⁹. The Batibo Court of First Instance convicted and sentenced the appellant on a two count charge for entering upon land quietly enjoyed by another contrary to s. 239 and for threatening to kill another if he ever set foot again on the disputed piece of land, contrary to s. 302. Dissatisfied with the decision of the trial court he appealed. The appeal was argued mainly on the ground of procedural irregularity by the trial court. The facts of the case are simple. One Mbaku bought in 1998 a piece of land in Angie, Kulabei village, Batibo, from one Forkwa. The transaction was reduced into writing. Mbaku planted certain cash crops (palms, cocoa, plantains and bananas) on the land. He occupied the piece of land peacefully until 2003 when the appellant allegedly threatened to kill him with a gun if he were to find him again on the said piece of land. Appellant asserted that he inherited the piece of land in question from his late father and was thus entitled to enter upon it. He denied having threatened Mbaku. The trial court did not believe him and so entered a judgment of conviction against him. He appealed. Held, Nko J delivering the judgment of the Court of Appeal, that there was ample corroboration of Mbaku's evidence that the appellant was seen on the disputed piece of land armed with a Dane gun which he used to threaten Mbaku; and that Mbaku was in possession of the farmland and enjoyed it quietly until Appellant intruded and threatened him. On the point of procedural irregularity the Court held that although it is not every procedural irregularity that is a ground for quashing a conviction, nevertheless, in the instant case the fact that the trial magistrate proceeded to try the appellant immediately after his plea without informing him of his rights and without giving him time to prepare his defence are irregularities which in

⁴⁹⁸ Criminal Appeal, No. BCA/28.c/82, unreported.

⁴⁹⁹ Criminal Appeal, No. BCA/MS/25c/2005, unreported.

themselves go to the root of the case and form a ground for quashing the conviction in this case.

On a charge under the section, and as regards this particular ingredient of the offence, the onus on the prosecution is simply to show that the entry was in a way liable to disturb, and not that it actually disturbed, the public peace. On the other hand an unlawful entry does not constitute an offence under section 239 if it is done peaceably. If entry into the land, lawfully or unlawfully, is forceful the person so entering will not escape a conviction under the section by pleading that he thereafter enjoyed the land peaceably, taking good care of it. It was so decided in *Kum Lucas Che v The People* (2007)⁵⁰⁰. One Mami Maria Massina, an immigrant stranger of Ewondo origin from former French Cameroun, lived in Befang for about 50 years. She lived in a house on a plot of land allotted to her by the local chief. A few months before her death in 1998 she had a primary school teacher write a document for her. In that document she left her house to one Chi Christopher who then put it on rent. In 2002 one Achu James Achiri pulled down the house on the grounds that the land had been allotted to him by the appellant, Chief Ojang of Befang. Appellant's defence was that the land was freely allotted to the deceased. On her death the land reverted to the palace, that is, to the chief-in-council. As custodian of all community lands, the chief then re-allotted the said piece of land to him.

He was tried and convicted under section 239. That section of the Penal Code punishes "whoever ... disturb[s] the public peace [by] enter[ing] upon land quietly enjoyed by another." He appealed against his conviction and sentence. In dismissing the appeal the Court of Appeal (Mboh, Fonjock, Mbaki, JJA, Vice Presidents) agreed with the reasoning of the trial court that at the time Achu James Achiri pulled down the house Chi Christopher was in possession and in quiet enjoyment of the piece of land in question. Fondjock J who delivered the decision of the Court said: "The entry of appellant into the property in the year 2000 was forceful and liable to lead to a breach of the public peace. When one enters on to land forcefully whether he starts caring for it or not does not make the offender less culpable." On this point the Court of Appeal was on firm grounds.

Unfortunately, the Court then over-reached itself when it unnecessarily and controversially imported into this matter the repugnancy clause in the Southern Cameroons High Court Law 1955. The Court characterised as repugnant to natural justice, equity and good conscience the well-established African system of land tenure whereby land allotted by the village chief to immigrant strangers reverted to the chief as custodian of village lands when the allottee dies without any heirs. In the view of the Court "such custom woefully fails the test of section 27(1) of the Southern Cameroons High Court

⁵⁰⁰ Criminal Appeal, No. BCA/MS/30c/2005, unreported.

Law 1955 and ... is also repugnant to public policy.” Nothing can be further from the truth.

The reasoning of the Court is indefensible, all the more so as the Court does not show in what ways the custom it impugns is repugnant to natural justice, equity and good conscience, or to public policy. The law referred to does not say that the custom of land reverting to the village chief is repugnant. On the contrary, it is a good custom that seeks to ensure rational use and distribution of vacant lands consistently with the dictates of good husbandry. This part of the Court’s decision has no relevance at all to the case and was not necessary for the resolution of the matter at hand. It is common learning in African system of land tenure that the use of land can be transferred temporarily or permanently, as when immigrant settlers are allowed to settle on community land. They are allowed to settle at first conditionally upon proving in course of time to be satisfactory components of the host community, and later absolutely upon virtual absorption by and complete assimilation with the landowning group.

If a man enters upon land peaceably and afterwards conducts himself in manner liable to disturb the public peace, there is no transgression of section 239. For, in such a case it is not entry but conduct after entry that is in manner liable to disturb the public peace. In *Tamon Anono & Munyah Tailop v. The People* (1979)⁵⁰¹ Nyo’ Wakai, CJ said:

“The point of time to look at in order to determine that the quiet enjoyment is disturbed is the time when the entry is made. If it is shown that the alleged quiet enjoyment has been constantly and persistently challenged then the claim of quiet enjoyment is absolutely ousted. But if there is no precedent challenge to the quiet enjoyment and it is clear that the complaining party knew or ought to have known of acts which were exerted to show that land was being enjoyed quietly, then on a first complaint, it cannot be said that the full elements of the offence would have been committed.”

In that case the appellants were apparently in possession of a piece of land (a raphia bush) to which A, the complainant, laid claim. The area was extensive, involving several persons, including the appellants, claiming some interest over portions, which were imprecise and difficult to ascertain. In the past there had been some litigation in the customary courts about title or ownership of the land. But in the Magistrate’s Court where the appellants were tried, convicted and sentenced for having committed an offence under section 239, the facts in issue were principally involved with possession. The Court of Appeal observed that under section 239:

⁵⁰¹ Criminal Appeal No. BCA/34.c/79, unreported.

“it does not matter who owns the land so long as the person whose quiet enjoyment is disturbed is on the land” and that the critical time for determining whether quiet enjoyment has been disturbed “is the time when the entry is made.”

The Court quoted with approval the following broad principle enunciated in its earlier case of *Cornelius Tabifor Cho & George Ambe Che v. The People* (1977)⁵⁰²:

“A building on a part of the land with definite boundaries is a mark of possession of the entire land and it is for this reason that the owner of the entire land is considered the owner in possession of the entire land and he can thus bring trespass proceedings against anyone who interferes with the quiet enjoyment of the other unoccupied parts of his land.”

Sambong Nde & 2 Others v. The People (1977)⁵⁰³ extended this principle by emphasising the interrelation of title and possession:

“The operative word here is possession. Title, in our opinion, only lends additional weight to a claim of possession by anyone who proves title.”

The gist of the dicta in *Cornelius Tabifor Che* and *Sambong Nde* is that there is a presumption that he who has title may, of necessity, have possession whereas it does not necessarily follow that he who is in possession is necessarily a titleholder. In order to secure a conviction under section 239 it is thus not enough to prove title without in some way linking it with possession. “If one wants possession to be imputed to title in order to bring the offender within the mischief of the section, such proof of title must be definite and positive as to the boundaries of land whose quiet enjoyment is being disturbed⁵⁰⁴.”

Turning to the instant case the Court noted that when the Magistrate’s Court moved to the locus in quo the appellants clearly demonstrated by clear boundary trees planted by them the piece of land they claimed to be in possession of and upon which they had entered, whereas the complainant could not show with any degree of precision the extent of the land he was laying claim to. The Court did not therefore feel sure that complainant’s claim was well grounded. The issue was therefore resolved in favour of appellants, whose convictions and sentence by the trial court were set aside.

Sometimes the courts erroneously proceed as if section 239 criminalizes a bare trespass. The gist of the offence under s.239 is the imperilling of the public peace by the type of conduct stated in the section. In other words, the basis of the criminal sanction against the impugned conduct lies in its tendency

⁵⁰² Suit No. BCA/4.c/77, unreported.

⁵⁰³ Suit No. BCA/22.c/77, unreported.

⁵⁰⁴ Per Nyo’ Wakai, CJ in *Sambong Nde & 2 Ors v. The People*.

to arouse angry passions and provoke retaliatory action, thus endangering the public peace. Admittedly, a bare trespass is still a wrong since in tort law every invasion of property, be it ever so minute, is a trespass and actionable *per se*.

However, a wrongful entry is not *ipso facto* such as is liable to disturb the public peace; for, though wrongful the entry may nevertheless be peaceable. In *Nforni Andrew Burnya v. The People* (1978)⁵⁰⁵, Ekor' Tarh, J said that it must be shown that the accused entered the land in a manner likely to create a breach of public peace or lead to a riot, and that since section 239 protects "possessory rather than title right" it does not matter under the section how a person came to be in possession but his quiet enjoyment of that possession is guaranteed by the law once he is on the land without opposition.

In that case **A** purchased a piece of land in Ndu and entrusted it to a caretaker who planted trees around it but otherwise abandoned it throughout the ten years **A** was away from Ndu. When he returned to Ndu he found the land occupied by appellant who had, without any opposition even from the caretaker, entered upon the land and developed it by erecting two houses thereon. When asked to quit the land the appellant refused to do so, and instead offered **A** an alternative piece of land which **A** found he could not develop because it was earmarked as a water source for the community. The matter was eventually reported to the Police and resulted in the appellant being charge with an offence under s. 239, tried, convicted and sentenced.

He appealed to the Bamenda Court of Appeal (Nyo' Wakai, CJ, Ekor' Tarh and Nganje, JJA). Held, allowing the appeal, that s. 239 protects possession rather than title and that it does not matter under the section how a person might come to be in possession. In the view of the Court, **A** never enjoyed possession of the land in question and his acceptance of an alternative plot from the appellant strongly pointed to the fact that he acknowledged the appellant's possession of it. The Court was further of the view that whether truly or falsely the appellant acquired the plot, he developed it without anyone opposing him, and quietly lived on it for over six years.

In *The People v. Joseph Besena Nyambi & Clement Nyambi* (1978)⁵⁰⁶, the Ekor' Tarh, J delivering the unanimous decision of the Bamenda Court of Appeal (Ekor' Tarh, Nganje and Mbuagbaw, JJA) stated:

"In principle and in fact [section 239] protects possessory rather than proprietary rights of persons. The entry, which is likely to disturb the public peace, must be such with traits of aggression and naturally against the wish of the occupier. The section also does not consider to whom the land belongs but who at the time of transgression was in possession. So a landlord could be charged under this section at the complaint of his tenant or a licensor at the instance of his licensee. The

⁵⁰⁵ Criminal Appeal, No. BCA/6.c/78, unreported.

⁵⁰⁶ Criminal Appeal No. BCA/1.c/78, unreported.

basic element is therefore possession of the land and not the title thereto.”

It follows that when a charge is laid under section 239 it is incumbent on the prosecution to state what the ‘manner liable to disturb public peace’ consists of. For, section 239 does not penalize a bare or peaceable trespass, but trespass presenting a threat of a violent character. While the slightest crossing of a boundary is sufficient for the tort of trespass to land, the section 239 offence requires something in the nature of trespass *vi et armis* (with force and arms). The sheer numbers of the trespassers would be entry in a manner liable to disturb public peace. This is so because such numbers would be an implied threat to the possessor of the land in case of resistance.

The offence under section 239 is not committed in the absence of any conduct amounting to a threat of violence. A rambler may go through land, a person may disport himself in someone else’s garden, a car owner may park his car on someone else’s land, a backpacker or a squatter may pitch his tent for the night on someone else’s land. None of these acts would amount to a transgression of section 239, although an action for the tort of trespass could lie.

In *Daniel Munya v. The People* (1981)⁵⁰⁷ it was held that mere entry onto a piece of land, without signs of violence, does not amount to an offence under s.239. X agreed to buy a piece of land from the appellant for 20 000 francs and paid 13.000 francs, the balance of 7 000 francs to be paid on a specified date, which he failed to and that sum thus became an amount still due and owing. After X had built a foundation and planted eucalyptus trees on the plot he found appellant’s wives on it and reported the matter to the Village Traditional Council which decided that the Chief owned the plot in question and that it should be given to X. The appellant then offered to give back to X the 13.000 francs advance that had been paid to him, and to take back his plot. X refuse to take back the money and demanded from the appellant, as condition for the return of the plot, the sum of 160.000 francs as compensation for the development carried out on it. Sometime later, X sent Y to cut some trees on the plot and while he was doing so the appellant came along and told Y to stop cutting the trees. Y sent for X who came and found the appellant standing under a tree being cut by Y. The matter was reported to the Police, eventually leading to the prosecution and conviction of the appellant for an offence under s. 239, and sentence to the maximum penalty of one year’s imprisonment.

The appeal was argued before their Lordships Njamnsi, Asu and Anyangwe, JJA who, after considering the arguments canvassed by both sides, allowed the appeal, quashed the conviction and sentence of the court below, and entered a verdict of not guilty in favour of the appellant. In doing so the

⁵⁰⁷ Criminal Appeal No. BCA/1.c/81, unreported.

learned Justices of Appeal marshalled the following line of reasoning.

“It is clear from the facts of the case that [X] had taken possession of the plot in question without paying the balance of the purchase price ... but proceeded to take advantage of the appellant’s being away for treatment for one year to build a foundation and planting of food crops on the plot. The traditional Council unlike the Customary Court has no legal existence and as a result the purported act of the Traditional Council ... was null and void for want of legal existence by the Traditional Council. Therefore the defence of *jus tertii* [the right of a third party] is not available to [X] as against the appellant.”

Their Lordships continued:

“Even if [X] were to be in quiet enjoyment of the plot his quiet enjoyment of the plot would have been, in the circumstances, subject to the right of re-entry by the appellant to ask for his balance of money still owing. But [X] entered unto the plot without paying completely for the plot and as a result there was disagreement between him and the appellant whereby the appellant offered to refund the 13 000 francs and to take back his plot, but [X] would not accept it and was demanding the sum of 160 000 francs because of the development thereon. This rancour between the two parties shows that [X] had never had a quiet enjoyment of the plot, which could be disturbed by the appellant within the purview of the provisions of section 239 of the Penal Code. Besides, we are of the opinion that mere entering into a piece of land without signs of violence for the purpose of demanding a right as the appellant did in the circumstances of this case does not amount to disturbance under section 239 of the Penal Code.”

It is submitted with due respect that the soundness of this line of reasoning may be doubted. There was an agreement for the sale of land. The agreement was reduced into writing. There was agreement on the sale price. An advance of about 90% of the agreed price was paid, and the small balance still owing was still to be cleared. What did the sale agreement stipulate regarding the passing of title and the taking of possession? The Court reasoned that ownership and possession were to pass only upon the payment of the full purchase price. This is doubtful. The fact that appellant offered to refund the 13 000 francs to X and to get back his land is the clearest of evidence that both ownership and possession of the land had passed to X and that the appellant himself acknowledged this fact. Furthermore, while in law the purchaser of property may, generally speaking not claim ownership of it until the price has been fully paid, it is not the case regarding possession. A purchaser may take possession of the property even though he has not yet paid the full purchase price or even a cent. It all depends on what the parties stipulated. Common examples of taking possession of property before payment of the full price are hire purchase sales, credit sales, mortgages, and common conveyancing

practice.

In the instant case X took possession of the land peaceably and openly, not secretly, and carried out development on the land over a period of time. It would be incredible that appellant was never aware of the entry and the activities on the land. He may have been ill and away for one year receiving treatment. But, that alone would not have prevented him from knowing what was going on regarding the piece of land in question. His wives were there and must certainly have given him information regarding the land. He had constructive knowledge and his forbearance can only mean X took possession of the land either by his leave or with his acquiescence. Clearly X had quiet enjoyment of the land up to the moment when the appellant, acting through his wives, entered onto the land. It was this entry that triggered the intervention of the Traditional Council (to whose jurisdiction the appellant voluntarily submitted himself but whose ruling he rejected when it did not favour him), his attempt to rescind the purchase agreement by offering to return the advance paid on the plot and to repossess the same, his entry personally onto the plot, and his subsequent arrest and prosecution.

The jurisprudence of both the Bamenda and Buea Courts of Appeal are clear that if a person is in possession of land it matters not, for the purpose of section 239, how he gained possession in the first place, provided that at the time he took possession of the land there was no opposition to his doing so. All the appellant was entitled to was the balance of the purchase price which was a debt still owing and due and which he could have sued to recover, rather than resorting, even as the vendor of the piece of the land, to the rather unorthodox way of demanding a right by entering upon land quietly enjoyed by another.

Finally, the point is worth making that under section 239 the question is not the purely mechanical oppositional issue whether the entry was peaceful or violent. The issue throughout is whether the entry is liable to disturb public peace. Of course if an entry is violent it is *ipso facto* an entry liable to disturb public peace. But it is not the case that just because an entry is peaceful it is necessarily an entry not liable to disturb public peace. Thus if a multitude of people peacefully and even prayerfully enter a piece of land a court may, after assessing the factual situation, rightly come to the conclusion that the entry is such as liable to disturb public peace, and convict those involved.

A charge that simply recites that the accused entered upon land quietly enjoyed by another and in manner liable to disturb the public peace, without giving further particulars, is bad for vagueness⁵⁰⁸. **A**, the late father of **B** and unknown to **B** made a customary law pledge for £7 sterling of a piece of land to **C**. In 1958 **B** sued **C** in the customary court seeking a declaration of title to

⁵⁰⁸ *Donatus Chick & Evaristus Mundi v. The People* (1982), Criminal Appeal No. BCA/4.c/82, unreported, per Njamnsi, J.

the land under the occupation of **C** by virtue of the customary pledge in his favour. The customary court decided that **B** must first redeem the pledge by paying the pledged sum of £7 sterling before the declaration of title sought can be made. **C** who was in effective possession of the land refused to accept the £7 paid to redeem the pledge. He appealed against the customary court judgment to the Divisional Officer who in 1960 sent the case back to the customary court for it to be reopened. The case was reopened as directed by the Divisional Officer but **C** soon died before the customary court had time to deal with the matter *de novo* ('anew').

Immediately **C** died the 1st appellant took possession of the land by inheritance. The 2nd appellant together with his father farmed a piece of land adjacent to the piece of land which 1st appellant had inherited from **C**. 2nd appellant inherited that piece of land from his father when he died. **B** made sustained but unsuccessful efforts, through litigations and reports to the Administration, to have the appellants ejected from the two pieces of land in question on the ground that he was the rightful owner of the said parcels of land. Meanwhile the two appellants had continued possession of their respective parcels of land. In 1981 **B** lodge a complaint with the Mbengwi Police against the appellants for disturbance of quiet enjoyment of the pieces of land in question.

Police investigations resulted in the appellants being charged jointly on a one-count charge with disturbance of **B**'s quiet enjoyment of the land. On these facts the trial Magistrate found both guilty as charged and sentenced each of them to 3 months imprisonment or to pay a fine of 10 000 francs. They appealed. The Bamenda Court of Appeal (Njamnsi, Asu, and Arrey, JJA) had no difficulty allowing the appeal and quashing the conviction and sentence of the trial court on the grounds that although **B** had been fighting for possession since 1958 he had never been in possession of the land, while the appellants had been in possession of the land in question since the 1960s.

To determine whether entry upon the land was in manner liable to disturb the public peace the following matters would have to be considered. Did the accused enter upon the land *vi et armis* (by force and arms)? Was there (in the case of several accused) an unlawful assembly on the land, a procession, a riot, or other circumstances amounting to something more than a bare trespasser?

Did the accused clear, farm or cultivate the land or make a foundation or build some structure or plant some crops or trees on the land? Did he damage a house, a foundation, a structure or crops on the land? Did he cut down trees growing on the land or procure other people to encroach on the land? Did the accused come unto the land with a multitude of people or with weapons or with commotion or with menace of life or limb or with some other circumstance of terror?

Land quietly enjoyed by another: Land of course includes any house, building, structure, crops, trees and plants on the surface as well as minerals and oils underneath the surface. Since in general the owner or possessor of the surface of the land owns or possesses all the underlying strata also, any entry, in manner liable to disturb the public peace, beneath the surface at whatever depth, is equally an offence. The maxim of land law is *quicquid plantatur solo, solo cedit* ('whatever is attached to the soil cedes to or becomes part of the soil').

It is incumbent upon the prosecution to show that the possessor of the land was quietly enjoying it at the time the defendant entered upon it. If the piece of land in question was at the material time still the subject of protracted disputes the occupier cannot be said to have quiet enjoyment over it. It was so decided in *Massango Paula Imelda Njoku v. The People & Fotabong Michael* (1997)⁵⁰⁹.

The facts of that case are straightforward. In 1941 the Governor of Nigeria (the UN trust territory of the Southern Cameroons was at that time administered by the UK as part of Nigeria) made a freehold grant of about 14.1 hectares of land to one David Carr. The land is located behind present-day Nurses Quarters and is variously referred to as Carr Estate or Dibanda Estate. David Carr enjoyed undisturbed possession of the land until his death when it passed to his son. The appellant, Massango Paula Imelda Njoku, the grand daughter of the late David Carr, obtained in 1987 a piece of building plot from that estate. It is that same piece of land that the 2nd respondent, Michael Fotabong acquired from the State, evidenced by a land certificate issued in June 1993. According to him the State had taken over the land from the Carr family and was thus in a position to dispose of it. In April of that same year the 2nd respondent found that someone had entered the land, destroyed some food crops planted on it and erected two semi permanent structures. He lodged a complaint and the appellant was arrested and charged with disturbance of quiet enjoyment of land contrary to section 239 of the Penal Code. She was convicted and sentenced, and she appealed.

The Court first found for a fact that the Carr family was the possessor of the land. It then went on to determine whether the State lawfully took over the land from the Carr family and whether at the material time of the alleged entry onto the land by the appellant the 2nd respondent was in quiet enjoyment of it. The Court observed that the State took over the Carr Estate in violation of the land expropriation Ordinance of 1974. It concluded that "since there can be no break in the chain of possession, the Carr family passed over possession" of the litigious piece of land to the appellant in 1987 and that it was of no moment that the appellant started to construct buildings on the said piece of land only in 1993.

⁵⁰⁹ (1998) 1 CCLR 1-125 Part 4, p. 119.

On the issue of quiet enjoyment the Court made the factual finding that the piece of land in question had over the years been the subject of litigation and adverse claims by the appellant's family and the State, with the appellant's family challenging the alleged right of the State to alienate any part of the land forming part of the Carr family freehold estate. On these findings the Buea Appeal Court (Arrey, CJ, Bawak and Ebong JJA) held (Bawak J delivering the unanimous decision of the Court), that "no one can be said to have the quiet enjoyment of a piece of a parcel of land over which hangs protracted disputes". And further, that since the appellant in 1987 acquired the right to enter on the piece of land she was the possessor thereof and so when she entered upon the land in 1993 she lacked the criminal intent necessary to sustain a conviction under section 239.

Under section 239 the person to whom the land belongs makes no difference. The section seeks to ensure that public peace is not jeopardized by conduct such as the entry upon land quietly enjoyed by another since such a forcible entry may lead to a breach of the peace. The interest protected by the section is therefore public peace and not possession or even ownership. The section is indifferent as to how the possessor may have come by the land and as to whether acquisition of possession was wrongful or rightful⁵¹⁰. If the possessor has been in quiet enjoyment of the land, no one may enter upon it in manner liable to disturb the public peace. The section does not prohibit entry upon land quietly enjoyed by another. What it prohibits is entry in manner *liable* to disturb the public peace. The provision is therefore concerned not with the actual disturbance of quiet enjoyment as the caption of the offence misleadingly and incorrectly suggests, but with the likelihood of disturbance of public peace.

The mere *de facto* or even wrongful possession of land is a valid title of right as against all persons entering thereupon in manner liable to disturb the public peace. Hence, although the proprietor, landlord or licensor may enter land being quietly enjoyed by an occupier or by a tenant or by a licensee, the entry must not be in manner liable to disturb the public peace. A landlord may thus be charged under the section at the complaint of his tenant, or a licensor at the instance of a licensee, or even an owner upon complaint of a squatter. Indeed, the expression 'squatter's right', popular in some Western countries, has some legal significance even in this country. A squatter who is quietly enjoying land that he is in adverse possession of is protected by section 239, for no one may enter upon that piece of land in manner liable to disturb his quiet enjoyment of it.

In *Michael Fotsue v. The People* (1973)⁵¹¹ the appellant and the complainant (the 1st prosecution witness in the case) occupied adjoining plots of land given

⁵¹⁰ *Nfomi Andrew Burnya v. The People; The People v. Joseph Besena Nyambi & Clement Nyambi.*

⁵¹¹ (1971-1973) UYLR 130 at p. 131.

to them by different individuals. One day the complainant was pegging out his plot preparatory to laying the foundation for a house when the appellant came upon the plot and removed the pegs. A complaint was made to the police whereupon the appellant was arrested and charged under section 239. He was tried and convicted. He appealed. It was contended on his behalf that since the complainant was not the owner of the piece of land in dispute the appellant by entering upon the land and removing the pegging for the foundation could not be said to have disturbed the complainant's quiet enjoyment of the land.

Held, by the Bamenda Court of Appeal (Thomas, CJ, Inglis and Ekor-Tarh, JJA), Inglis, J delivering the unanimous decision of the Court, (1) that s. 239 aims at ensuring that anyone who is in possession of land, be he a squatter, should not have his possession disturbed even by the rightful owner; (2) that the essence of the offence is the likelihood of a breach of the peace and not the issue of title to the disputed piece of land.

The fact that the accused is the rightful proprietor of the land does not excuse his violent or forcible entry upon land being quietly enjoyed by another. For, no man may with force and violence assert his own title. The law restrains all persons from having recourse to violent methods of doing themselves justice. It is of course not necessary that in all cases a man should resort to judicial proceedings in order to seek remedies for injuries threatened or committed against him. In some instances the law grants him liberty to help himself by his own act and strength. In tort law a person wrongfully dispossessed of land is not bound to proceed for its recovery by action at law. He may retake possession of it by his own act, provided he can do so peaceably and without the use of force.

When a person is quietly enjoying land, he is in possession of it. And being in possession of the land he may or may not be the owner thereof. Thus, under section 239 it is not enough to prove title without in some way linking it with possession since one may have ownership and yet not be in possession⁵¹². A building on part of a piece of land with definite boundaries is an indication of possession of the entire land thus demarcated and the owner in possession thereof can initiate a prosecution under section 239 against anyone who forcibly enters upon even that part of the land on which there is as yet no improvement⁵¹³.

If eight people, being joint tenants possess a piece of grazing land where their cattle graze indiscriminately as none of the individuals possesses any particular area, a charge under section 239 by one against the others must

⁵¹² *Sambong Nde & 2 Others v. The People* (1977), Criminal Appeal No. BCA/22.c/77, unreported.

⁵¹³ *Cornelius Tabifor Che & George Ambe Che v. The People* (1977), Criminal Appeal No. BCA/4.c/77, unreported.

fail⁵¹⁴. This is so because joint tenants are together and at the same time in possession of the land. An entry onto the land by one or more of the said joint tenants cannot be said to be a disturbance of the quiet enjoyment of land by the others. For a joint tenancy is treated as a single unit, no one person having a separate share. This means each joint tenant is entitled to possession of the whole property. To hold a joint tenant guilty under the section would be like saying, absurdly, a person may be held guilty for disturbing himself in the quiet enjoyment of the land he is in possession of.

The essence of the offence created by section 239 is the likelihood of a breach of the peace; the title of the parties is not in issue⁵¹⁵. The section cannot therefore be used to eject a person in possession of land on the ground that his title to the said land is defective. It has thus been held that where persons have not been living on a piece of land as trespassers but under a *bona fide* claim of right, and another person who has never lived on the said piece of land seeks to eject them by taking criminal proceedings under s.239, the charge preferred is bound to fail⁵¹⁶.

If a person whose quiet enjoyment of land is alleged to have been disturbed is never called at the trial to give evidence, this default will be fatal to a charged under the section. In *Ndeh George v. The People* (1978)⁵¹⁷ the appellant went to a piece of land in Mankon and sealed the pruned parts of a raffia palm tree bush with mud, and destroyed two calabashes of palm wine. On these facts he was charged with an offence under section 239 and convicted by the Magistrate's Court even though the person whose quiet enjoyment of the land was allegedly disturbed was never called to give evidence. The Bamenda Court of Appeal (Ekor-Tarh, Nganje and Mbuagbaw, JJA) had no difficulty in holding (Mbuagbaw, J. delivering the unanimous decision of the Court) that since the person whose quiet enjoyment was alleged to have been disturbed never testified at the trial this fact was fatal to the prosecution's case.

If **A** is successfully prosecuted under s.239 for having entered land quietly enjoyed by **B** and in manner liable to disturb the public peace, the conviction of **A** is in no way proof that **B** indeed owns the piece of land in question or even that his possession of the said piece of land is rightful. Those are civil law issues for which an action in tort is the appropriate remedy. In the *Clement Tanke Ndifor* case, Thomas, CJ said, *obiter*, "We would like to make it clear that nothing decided in the proceedings in this court and in the lower court is to be understood as deciding the right of title in either of the contending parties to the land in dispute. That issue may yet be finally determined by the proper

⁵¹⁴ *Yuandim Simon v. The People* (1981), Criminal Appeal No. BCA/44.c/ 81, unreported.

⁵¹⁵ *Michael Fotsue v. The People*.

⁵¹⁶ *Donatus Chick & Evaristus Mundi v. The People*.

⁵¹⁷ (1998) 2 CCLR 127-254 Part 5, p. 167. (1998) 2 CCLR 127-254 Part 5, p. 167.

tribunal⁵¹⁸.”

In tort law an action for trespass may be used to determine a disputed title to land. The law of criminal trespass cannot be used for that purpose. The courts will not suffer s.239 to be used as a short cut to test or to establish title to disputed land. A trespassory entry is actionable in tort, but cannot found a charge under section 239 unless it directly tends to a breach of the peace.

Punishment: The transgression of section 239 is punishable by imprisonment for from 15 days to 1 year.

§7. False news

Historical: In English-speaking countries the origins of the offence of publishing false news can be traced to the Statute of Westminster of 1275, which introduced in England the crime known as *de scandalis magnatum* or *scandalum magnatum*. The offence was created with the primary objective of preventing false statements, which could threaten the security of the state. It was therefore an instrument of repression. However, only a few cases were ever prosecuted under this law. Given its ineffectiveness the crime was repealed in 1887. But the British nevertheless introduced the offence in the criminal law of British colonial territories.

Definition: A person is guilty of an offence if he “publishes or propagates by any means whatever any news without being able to prove either its truth or that he had good reason to believe it to be true⁵¹⁹.” The gist of this offence is the risk of causing a breach of the public peace. The crime is therefore different from kindred offences such as false report (section 304) and defamation (section 305), both of which are offences against personal liberty.

Publishes or propagates: These two verbs are used conjunctively, implying similarity. Publish or propagate means spread or disseminate, whether verbally or in writing. The publication or propagation of false news is the subject of indictment under section 240, whether the publication (propagation) is by handwriting, print, broadcast, sign, effigy, picture, or word of mouth, and irrespective of the tongue in which it may have been done. But the publication is not indictable unless it directly tends to or is calculated to cause a breach of the public peace.

In *Walter Mesumbe Wilson v. Commissioner of Police*⁵²⁰, the appellant was president of an organization with a political bias known as *Vikuma* (an acronym of Victoria, Kumba and Mamfe). On 28 November 1964 he

⁵¹⁸ At page 91.

⁵¹⁹ Section 240.

⁵²⁰ (1965-1967) W.C.L.R. 6

published at Kumba an article in pamphlet form, which he distributed to members of the public and to members of the KNDP political party who were attending a session of their annual convention in Kumba. The article bore the caption, 'Open Letter to the Life President-General and Members of the KNDP'. Copies of the letter were sent to President Ahidjo in Yaounde, to Mr. JC Ngoh the Federal Inspector for West Cameroon, and to the Federal Security Services. The 'Open Letter' read in part,

"National unity cannot be achieved no matter how loudly it is preached, when one section of the community, on account of numbers, has to lord it over the rest, converting public property to their own private ends to the extent of even administering Government Departments as though they were undertakings. ... Vikuma is at the verge of asking the President of the Federal Republic to declare West Cameroon an emergency area, suspend the West Cameroon Government and appoint an administrator to take charge of affairs until matters are settled."

The appellant was convicted for publishing a seditious article and sentence to 6 months imprisonment. The Court of Appeal confirmed the conviction and the sentence. In doing so, Gordon, CJ observed,

"The only inference to be drawn from this [publication], is that local conditions are so bad, due to maladministration in the ways enumerated, that the only solution open to the President of the Republic, to save West Cameroon from itself, its administration and ultimate bankruptcy, is to withdraw its constitutional rights. ... Whether construed piecemeal or as a whole, the article is clearly calculated to stir up discontent, disaffection, ill-will and even hostility among different elements of the population, and further to bring the Government into hatred and contempt. ... The article is unquestionably seditious in its content."

News: The material published must be 'news'. 'News' is any new or fresh information, any report of recent events. This requirement removes from the ambit of s.240 the propagation of a mere rumour or the publication of a statement or a piece of information that is not news. There is no reason to suppose that the section refers only to national news. "News" must be taken to refer to any news, whether national or international.

Falsity of the news: The rationale for penalizing the publication of news that is false, is that the conduct could lead to a breach of the public peace. News is false within the meaning of s.240 if its disseminator or propagator is unable to prove its truthfulness or if he did not have good reason to believe the said news to be true. The test is therefore a subjective rather than an objective one. The question is not whether the news is, objectively speaking, true; it is whether the accused can prove that the news is true. This is rather curious

because news can be true and yet the reporter may not be able to establish that it is such.

Moreover it seems rather strange indeed that news should be deemed false merely because of the inability of its disseminator to prove its truthfulness or because he did not believe or did not have good reason to believe the news to be true. Supposing A reports, citing some media source, that a suicide bomber belonging to a national liberation movement has blown himself up at an important bridge destroying it and killing the soldiers who were guarding it. That piece of news is objectively true, but not having witnessed the event A cannot attest to its truthfulness. The most he can do is to cite his source and perhaps add that it is a dependable or reliable source. And yet it is doubtful that under s.240 it is enough for the propagator to cite his source for the news as proof of the truthfulness of the said news. All that the citing of source might do is to suggest that the propagator probably had reason to believe the news to be true. Even in that case, the disseminator of a news item might well cite his source and yet not have good reason to believe the news to be true.

Further, if news is objectively speaking true it beats the imagination why under section 240 it should be considered false simply because of the inability of the disseminator to prove its truthfulness. One would have thought that the onus ought to lie on the prosecution to establish the falsity of the news. One suspects the reversal of the burden of proof here is an attempt at gagging the press and as a clog on freedom of expression and of speech.

In the Canadian case of *Zundel v. The Queen*⁵²¹ the court pointed two main difficulties in using the test of falsity to deny a statement protection under the bill of rights: (i) the supposition that deliberate lies can never have a value, and (ii) the assumption that it is possible to identify the essence of communication and determine with accuracy that it is false and so make falsity a fair criterion for denial of protection to the accused. The court observed that it is difficult to conclusively determine total falsity. This is so because a given statement may offer many meanings, some of which seem false, others of a metaphorical or allegorical nature, which may possess some validity.

Zundel represents progressive thinking on the subject of the crime of false news and may be contrasted with the old conservative Nigerian case of *R. v. Amalgamated Press of Nigeria Ltd*⁵²². In that case the Supreme Court held that the offence of 'publication of false news with intent to cause fear and alarm to the public' had not been invalidated by the sections of the constitution guaranteeing freedom of the press and freedom of expression. In the view of the Court those freedoms guaranteed nothing but ordered freedom, and cannot be used to spread false news likely to cause fear and alarm to the public.

⁵²¹ [1992] 10 CRR (20) 193.

⁵²² [1961] 1 All N.L.R. 199.

Section 240 puts on the accused the onus of proving the truthfulness of the news even though that is not necessarily a matter peculiarly within his knowledge. The accused has a good defence if he can show that the news is true or that though it may not be true he nevertheless had good reason to believe it to be true. But otherwise, he must fail. It is however still incumbent on the prosecution to prove that there was publication of news tending to disturb the public peace.

Punishment: Publication of ‘false news’ is punishable by imprisonment for from 1 to 5 years and a fine⁵²³. This penalty is doubled for anonymous publication⁵²⁴. The reason for the enhanced penalty is the perception that anonymity is the clearest proof of the mischief to the public peace that the publication is calculated to cause.

§8. Contempt of race or religion

Section 241(1) creates and punishes the crime of “contempt of the race or religion of a number of citizens or residents.” The term ‘contempt’ is to be understood in the sense in which it is defined in section 152. However, since section 241(2) provides an increase penalty “where the offence is committed by means of the press or wireless” it follows that section 241(1) contemplates a contempt committed orally or by gesture.”

The words ‘race’ and ‘religion’ are to be taken in the sense which fairly belongs to them, and which they are intended to convey, that is to say, their ordinary and plain meaning. Race in this context refers not to ethnicity but to any of the several large subdivisions of mankind sharing physical characteristics such as, for example, skin colour, shape of eyes and nose, hair type and colour: the Black or Negro race, the White or Caucasian race, etc. Section 241 does not therefore punish contempt of tribe or ethnic community or a people. This is regrettable because hate speech and other contemptuous and xenophobic utterances against a people, a tribe or an ethnic group are time and again made even by those in authority.

By religion is meant a particular system of faith or worship based on the belief in the existence of God, a god or gods, for example, Christianity, Islam, Judaism, Buddhism, and Hinduism. The section is concerned with religion and with factions within a religion. Cases of religious intolerance and cases of racial bigotry and zealotry in the form of xenophobia could well be prosecuted under this provision, for such conduct always constitutes a danger to public peace and harmony.

In order to secure a conviction under section 241 it is not enough for the prosecution to show that the accused (i) committed contempt within the

⁵²³ Of from 20 000 to 10 million francs.

⁵²⁴ Section 240(2).

meaning of section 152, and (ii) that the contempt was directed at a race or religion. The prosecution must go further and show that the race or the religion, as the case may be, was that “of a number of citizens or residents.” The offence is not consummated if the contempt is of a race or religion to which no citizen or resident belongs. For example, since there are no Mongolians or Buddhists or Hindus in this country, contempt of the Mongolian race or contempt of the Buddhist or Hindu religion would be beyond the reach of section 241.

The section requires that the race or religion must be that of “a number of citizens or residents.” On a strict construction of that phrase any number from two upwards suffices. But it is doubtful that the issue is a purely mechanical one of simply finding out whether more than one person is involved. The critical factor is the danger to public peace that the contempt represents. Accordingly, in certain circumstances a handful of people would be enough; in others that would not be enough. The appraisal must be a question of fact for the trial court. And in making its determination the court would be minded to remind itself that the gist of the offence is the mischief to race or religion, including hurting the race or religious sentiments of others, which the contempt is calculated to cause, and, consequently, the risk of causing a breach of the public peace.

Indeed, contempt of race or religion is penalized because the conduct represents a danger to public peace. The conduct is not made an offence out of a desire to secure the respect for and dignity of any race or any religion. The danger to public peace and tranquility of the impugned conduct increases in proportion to the number of citizens or residents involved regarding the race or religion.

A person convicted under section 241(1) is liable to imprisonment for from 6 days to 6 months and to a fine⁵²⁵. Where the offence is committed by means of the media the fine may be increased⁵²⁶.

Subsection (3) of section 241 creates and punishes the distinct offence of committing contempt of the race or religion of a number of citizens or residents “with intent to arouse hatred or contempt between citizens.” The onus is on the prosecution to prove the oblique or ulterior intent (i.e. motive) required under this section. It must be shown that the defendant’s purpose or aim was to arouse hatred or contempt (i.e., scorn) between citizens inter se (not between residents inter se or between citizens and residents). This conduct not only imperils the public peace but also represents a danger to national solidarity. For these reasons, the offence attracts a heavier penalty,

⁵²⁵ Of from 5 000 to 500 000 francs.

⁵²⁶ Up to 20 million francs. Section 241 (2).

which is imprisonment for from 12 days to 1 year and a fine⁵²⁷.

§9. Discrimination

By s.242, whoever excludes another, by reason of his race or religion from any place open to the public or from any employment, shall be punished with imprisonment for from 1 month to 2 year and with a fine⁵²⁸. This offence punishes the discriminatory exclusion, on the ground of race or religion, of a person from any employment or from any place open to the public. Where a person is given employment or allowed into a place open to the public on racial or religious grounds that would be a case of ‘discriminatory inclusion’ not ‘discriminatory exclusion’.

A place open to the public is any place to which the public have or are entitled to have access, whether or not on fulfillment of some condition. These include any place of learning, worship, sports, recreation, entertainment, treatment, habitation, or even a thoroughfare. A ‘members only’ club or other facility is a place open to the public, the only condition of access thereto being membership. Provided a person fulfils the stipulated condition of membership, he cannot be excluded there from on the ground of race or religion. ‘Any employment’ includes employment in the private sector, whether by incorporated or non-incorporated bodies, or individuals.

This offence is cast in terms that are undesirably too narrow. First, the offence is cast in terms only of ‘exclusion’, nothing being said about ‘distinction’, ‘restriction’, ‘preference’, or ‘omission’. Secondly, the offence deals with discrimination on grounds only of race or religion, leaving it to be inferred that discrimination on grounds of gender, ethnicity, minority or other status, language, descent, nationality, or sexual orientation is permissible. Thirdly, the discriminatory exclusion from access to certain government services and facilities (e.g. in the provision of amenities) does not appear to fall within the terms of the section. It is submitted that a wide meaning should be read into the term ‘race’ so as to include ‘ethnicity’ and ‘nationality’. That will bring the meaning of that word in line with the meaning assigned to it under contemporary human rights law.

§10. Public drunkenness

By section R. 267(12), a person commits the summary offence of public drunkenness if he is “found drunk and disorderly in a public place⁵²⁹.” It is not sufficient to show that the accused was in a public place and found to have taken one drink too much. The prosecution must go further and show that he

⁵²⁷ From 10 000 to 1 million francs (or up to 40 million francs where the crime is committed by means of the media. Section 241 (3).

⁵²⁸ From 5 000 to 500 000 francs.

⁵²⁹ Section R. 267 (12). The punishment is a niggardly fine of from 200 to 1200 francs.

was also disorderly. If a person is in a public place and is drunk but not disorderly, he commits no offence.

Section 243 is entitled ‘public drunkenness’. But in spite of that title subsections (1)(a) and (2) of section 243 create no offence of public drunkenness at all. The provisions are mere penalty sections that stipulate higher penalties for cases of repeated public drunkenness and cases of the sale of alcoholic drinks to a person manifestly drunk.

Where a person who has been convicted of ‘public drunkenness’ and is found within twelve months of that conviction to be drunk and disorderly, he becomes liable to imprisonment for from 15 days to 1 month and to a fine⁵³⁰. If he is again convicted of public drunkenness within twelve months of the second conviction for public drunkenness the penalty is increased to a maximum of 2 months imprisonment and a fine⁵³¹. The court may also impose the forfeitures described by section 30(1)(2)⁵³².

However, under section 243(1)(b) a person is guilty of an offence if being licensed to sell alcoholic beverages he delivers any such beverage on his premises to any person *manifestly drunk*. Publican, beware! The person targeted by section 243(1)(b) is not the drunkard but the publican. And the publican is guilty under the provision upon the mere delivery of the alcohol beverage on his premises to a person who is clearly drunk. There is no requirement that the drunkard should have consumed the alcoholic drink at the premises.

The offence is punishable by imprisonment from 15 days to 1 month and a fine⁵³³. The court may in addition order closure of the premises for up to 2 years, but must order publication of the judgment⁵³⁴. Upon subsequent conviction for the same offence committed within twelve months of the previous one, the maximum penalty is increased to 2 months’ imprisonment and a fine⁵³⁵. The court may also order closure of the public house for up to 4 years, but must order publication of its judgment⁵³⁶.

§11. Vagrancy offences

Sections 245-248 appear to target specifically the vagrant, that is to say, any person without settled home or regular work.

11.1. Begging

Section 246 deals with what it terms ‘aggravated begging’, while section 245 is concerned with what might, in apposition be called ‘simple begging’. By

⁵³⁰ From 2 000 to 35 000 francs. S.243 (1)(a).

⁵³¹ Maximum of 70 000 francs fine. S.244 (1).

⁵³² Section 244(2).

⁵³³ Of from 2,000 to 35,000 francs.

⁵³⁴ Section 243 (2).

⁵³⁵ Of 70,000 francs. Section 244 (1).

⁵³⁶ Section 244(3).

section 245, whoever having means of support or being able to work to obtain means of support, begs in any place for alms, shall be punished with imprisonment not less than 15 days and not exceeding 6 months.

The prosecution must show that the accused begged for alms. 'Alms' is an ancient word that means money, clothes, food etc. given to poor people. The section thus contemplates not only begging for money but begging for clothes or food as well. It is immaterial where and when the begging took place: in a public or private place, in the day or at night. However, the prosecution must prove that the accused had means of support or, at least, that he is able, by work, to obtain means of support. It is thus a defence to a charge under this section to show that the accused is without means of livelihood, or that he cannot get a job, or that he cannot work due to mental or serious physical incapacity. Poverty *per se* is not a defence. The section applies to the 'professional' beggar as well as to the amateur or occasional beggar.

A person is guilty of aggravated begging under section 246 if he begs for alms (i) with abuse, threats or assault; or (ii) after entering any dwelling (or enclosure thereto appurtenant) without the occupant's permission; or (iii) feigning sores or disablement; or (iv) in company of others (save spouses or parents with their young children, or a blind man with his guide).

A person convicted of an offence under section 246 incurs a penalty of imprisonment for from 6 months to 2 years. It is no defence to a charge under this section that the accused is mentally or physically incapacitated (quite apart from the defence of insanity), or that he has no means of livelihood, or again, that he is unemployed.

Although beggars are a common sight in our streets, begging is, for reasons of expediency, wisely never prosecuted. In fact, it is doubtful whether it serves any useful purpose having these begging offences in the statute book. Doing so gives the distinct impression of a design aimed at persecuting the poor in society, people who, because of their economic vulnerability, need the protection rather than the persecution of the state. Begging causes more of a nuisance, an inconvenience, to the general public rather than a danger to public peace. The solution to begging lies in job creation, and the adoption of a number of practical social welfare initiatives including that of ensuring that these vulnerable citizens are, with continuing state assistance, accommodated within the extended family structure.

11.2. Vagabondage

If any person without fixed abode *and* (conjunctive) without means of support is found in a public place, he can properly be convicted under section 247 (1). This vagrancy offence appears to be aimed at keeping away from any public place anyone who is homeless and has no means of support, even if he is not a rogue or is not 'idle and disorderly'. For a suspect to escape the wrath of

section 247(1) he must have both a fixed abode and means of support. A peddler of goods who has no fixed abode would be caught by the provision. Similarly, a common prostitute wandering around would also be caught by the provision because although she might have fixed abode prostitution is not a 'legitimate' means of support.

The crime carries a penalty of imprisonment for from 6 months to 2 years. This penalty is doubled in two cases⁵³⁷; where the vagrant is found in possession of any weapon or any instrument with which an offence may be committed (which means virtually any object); and where the vagrant has committed or has attempted to commit any act of violence against any individual. The vagrant is in fact a 'rogue and a vagabond'.

In addition to imposing the appropriate custodial sentence, the court must also impose the measures prescribed in section 42(1)(2)(3). Were s.247 to be enforced, 'street kids', squatters and other homeless poor people would find themselves behind bars.

11.3. Dangerous preparations

This crime is more of an inchoate offence. The crime is committed when a person, with intent to commit a felony or misdemeanour, carries any instrument fit for the forcing of entry into any immovable property⁵³⁸. The prescribed penalty is imprisonment for from 10 days to 1 year.

Section 248 (1) punishes the mere possession, on one's person, of any instrument whatsoever fit for forcing entry into any building with the intention there to commit a felony or misdemeanour. The expression 'instrument ... fit for forcing entry' does not signify that there exists certain instruments or objects that are in themselves fit, or that have been made specifically, for forcing entry into buildings. The expression must be understood as meaning 'capable of being used to force entry'. The ingenuity of the human mind is such that many are the instruments that may be used to force entry into a building; for example, a false 'key', a knife, a crowbar, a jemmy, acid, explosive, hammer, chisel, acetylene, a tunneling instrument, a gun. Nevertheless, it is doubtful whether Ali Baba and the Forty Thieves would be caught by this provision for what they used in forcing entry into the vault to get the wealth there hidden was not an instrument but the magic passwords 'open sesame'.

If a person is found at night in possession of any instrument fit for forcing entry into a building, the law presumes a criminal intent on his part⁵³⁹. In other words there is a presumption that the accused so found at night is guilty of the

⁵³⁷ Section 247 (2).

⁵³⁸ Section 248 (1).

⁵³⁹ Section 248 (2).

offence of 'dangerous preparations'⁵⁴⁰. This presumption may however be rebutted by showing that possession of the instrument, though in the night, was lawful or for an innocent purpose. 'Night' is not defined. But presumably it means, in this country, the interval between half past six o'clock in the evening and half past six o'clock in the morning.

In order to secure a conviction under s.248 it is not necessary to show that the accused actually forced entry into a building. It is sufficient to show merely that the accused had with him an instrument for forcing entry into a building with the intention of committing therein an offence characterized as a felony or a misdemeanour. Where the accused intended to commit a mere summary offence, or where the building was actually broken into, the section is inapplicable.

Section 248 is not concerned with forcing entry into a building. It is concerned with possession of an instrument fit for forcing entry into a house with intent to commit a serious offence inside the house. Possession of the instrument is comprehended as evidence of preparation to commit a crime inside the building. On general criminal law principles mere preparation is not indictable on the ground that it is remote and does not unequivocally evince an intention on the part of the accused to commit an offence. But here the law considers the conduct of going equipped with housebreaking instrument as a 'dangerous preparation' for the commission of an offence inside the building to be broken into. And it is because such preparation is considered to be dangerous that the inchoate conduct here is penalized as an autonomous offence.

However, it is important to observe that the section does not penalize the bare possession of housebreaking instrument; otherwise carpenters, electricians, plumbers and masons will all find themselves in jail, for the legitimate tools of their trade are capable of being used for housebreaking. What it penalises as 'dangerous preparation' is the possession of housebreaking instrument *accompanied by an intent* to commit an offence inside the house to be broken into. The prosecution must prove that specific intent as well, quite apart from the general criminal intent.

§12. Gaming and lotteries

Section 249(1) provides: "Whoever without such licence as may by law be required offers to the public with intent to engender a hope of gain, whether in money or in kind, (a) any wager or lottery; or (b) any other game in which chance plays a greater part than skill," shall be punished with imprisonment for from 2 months to 1 year, and/or fine⁵⁴¹. The offence punishes any unlicensed

⁵⁴⁰ C Anyangwe, 'Prima Facie Presumption of Guilt in the Cameroonian Criminal Process', 1 *Proceed. Africa*, 1989, p. 132.

⁵⁴¹ From 50 000 to 3 million francs.

gaming and lottery business or activity.

Attention is drawn to sections 42, 47, 57, 72 and 73 of Schedule III (B) to the Penal Code. Section 42 in that Schedule provides that any money or money's worth paid or deposited for or in respect of the purchase of a lottery ticket is recoverable as money had and received to the use of the person by whom the same was paid or deposited; and every sale or contract for the sale of a lottery ticket is void, and no action shall be maintainable by any person in respect of any such sale or contract, except by the purchaser for the return of the money or other consideration (if any) paid thereon.

In terms of section 47, any person called upon to give evidence against any other person charged under the provision of section 249 shall be freed from all criminal prosecution in respect of the offence with which such other person is charged, or any other offence under that section. Section 57 gives three circumstances⁵⁴² that would raise a presumption, until the contrary be proved, that any house, room or place in which a police officer is authorized by a superior police officer or an administrative officer in charge of police to enter on reasonable grounds that the same is kept in contravention of s.249, is indeed used in contravention of section 249. Sections 72 and 73 relate to the power of the government to license gaming and lotteries. In terms of section 72, nothing in the Penal Code contained shall apply (i) to any lottery or sweepstake organized and controlled by any race club in the territory; and (ii) to prevent the sale by raffle or lottery of articles exposed for sale at any bazaar or fancy fair held for raising funds in any institution of a public character, provided that permission for such sale shall have been given in writing by the Government. Under section 73 the Government may grant to any club a licence authorizing a lottery to be promoted and carried on, subject to any conditions contained in the licence, as an incident of entertainment by members of the club and their guests on the premises of the club. Furthermore, a lottery promoted and carried on in accordance with the terms of a licence issued under this section shall not be deemed to be a public lottery. This provision is repeated in section 249(2), which provides that no offer confined to the members of one club shall constitute an offer to the public.

On conviction under s.249 the court may order the forfeitures described by section 30 and the closure of the house, room or place, notwithstanding

⁵⁴² The circumstances are: (i) where a police officer authorized as aforesaid is willfully prevented from or obstructed or delayed in entering the same or any part thereof; (ii) where any external or internal door of, or means of access to, any such house, room or place shall be found to be fitted or provided with any bolt, bar, chain or any means or contrivance for the purpose of preventing, delaying or obstructing the entry into the same or any part thereof of any police officer authorized as aforesaid or for giving an alarm in case of such entry; and (iii) if any house, room or place is found fitted or provided with any means or contrivance for concealing, removing or destroying any instruments of gaming.

that it might also have been put to some legitimate use⁵⁴³. The court is further empowered to order confiscation under section 35, and may also order the confiscation of all furniture and furnishings and all funds and property set aside as prizes for the winners⁵⁴⁴.

§13. Keeping unlicensed pawnshop

By s.250 (a), whoever, without such licence as may be lawfully required, keeps any pawnshop or business of lending on a floating charge, is guilty of an offence.

This offence is committed only where the licensing is lawfully required, that is to say, there must exist legislation making the operation of a pawnshop or lending business on a floating charge subject to licensing. The offence presupposes an activity that is repeatedly done; a habitual activity; the *business* of pawning or of lending on a floating charge.

A floating charge or security is usually an equitable charge on all the assets for the time being of a company. It 'crystallizes' and becomes a fixed or specific (and no longer floating) equitable charge when the company goes into receivership or liquidation. A floating charge is often used as security for debentures (instruments issued by a company as evidence of a debt or as security for a loan of a fixed sum of money at interest) issued by the company.

A person is also guilty of an offence under subsection (b) of the same section if, although having the licence required by law, he nevertheless fails to keep such registers as may be prescribed.

Either offence is punishable by imprisonment for from 15 days to 3 months and with fine⁵⁴⁵.

§14. Witchcraft

Does witchcraft exist? That inquiry is beyond the scope of this book and the competence of this writer. But few would cavil at the objective reality of witchcraft or even Satanism, albeit that those who practice these crafts are usually not open about what they do. Contrary to popular misconception perpetrated by anthropologists and Euro-Christian theologians, witchcraft is not the monopoly of non-White peoples. Witchcraft exists in all continents and pre-dates Christianity. But the rituals, with varying efficacy, probably differ as a result of the belief system of each society. The colonial authority was quick to legislate against witchcraft precisely because the charms, totems, amulets and fetishes he saw reminded him of similar witchcraft paraphernalia in his own land.

⁵⁴³ Section 349 (3).

⁵⁴⁴ Section 349 (4).

⁵⁴⁵ Of from 25.000 to 50.000 francs.

The conduct punishable under section 251 is a typical example of the lawmaker's pretended skepticism of the supernatural. In *Lenga Andrew v The People* (2005)⁵⁴⁶, the Court of Appeal (Tume, Njumbe and Ambe, JJA, Vice Presidents) scoffed at the proposition that a mysterious fatal motor accident could be procured by the agency of witchcraft. Here are the facts of that case. One morning in June 2000 a certain Mariama Tchadogomou, a traditional healer and citizen of Togo, visited Zacheus Ngong, the customs officer in charge of the Customs Post at Abuenshie and informed him that appellant has asked her to kill him. Mariam's story is that she was on her way to Togo by road via Ako and then via Nigeria. The vehicle in which she was travelling stopped at the Ako frontier Police Post. There she met the appellant for the first time. Appellant got to know that she is a traditional healer. Later he approached her and proposed to hire her for a job.

At Abuenshie she was consulting her oracle when appellant came along and asked to be examined. She did and diagnosed diabetes and hypertension as the illnesses from which appellant was suffering. It was then that appellant informed her he wanted her to kill Ngong because Ngong had killed his (appellant's) brother. She charged 500 000 francs for the job plus a further 70 000 francs to purchase certain objects with which to do the job. Appellant made an advance payment of 60 000 francs and provided her with the names of three persons he claimed he was in league with to ensure that Ngong died. The names supplied turned out to be those of Ngong's children. Mariam developed cold feet, confronted appellant with this fact and aborted the plan to kill by esoteric means. The scheme eventually leaked. Ngong reported the matter to the local prosecutor. Appellant was arrested, charged with conspiracy to murder (section 275 as read with section 95(1)) by witchcraft, convicted and sentenced to seven years' imprisonment. He appealed. He denied that there was ever any conspiracy to kill because there was never any agreement between appellant and anybody to kill.

Held, Njumbe J delivering the decision of the Court allowing the appeal, (1) that to be convicted of conspiracy the party charged must have agreed with one or more others that a course of conduct shall be pursued; and in the instant case it had to be shown that murder would necessarily have been committed as a result of that agreement; (2) that for there to be conspiracy in the instant case there ought to have been a union of minds of Appellant and Mariam; but there was never a union of minds since the evidence of Mariam is to the effect that she had never at any point in time contemplated causing the death of Ngong; (3) that a conspiracy is not merely in the intention of two or more, there must be the further agreement to do the unlawful act or to do the lawful act by unlawful means; (4) that besides the evidence to justify the

⁵⁴⁶ Criminal Appeal, No. BCA/4c/2004, unreported.

inference of an agreement, evidence also had to be adduced that murder would necessarily have been committed as a result of that agreement.

The Court went on to marshal the following line of reasoning. "According to the evidence of Mariam the appellant had proposed that Ngong should have a mysterious fatal motor accident by the agency of her witchcraft. Suppose Ngong had indeed had a motor accident and died could any law court have attributed this death to witchcraft or better still could such death have been attributed to the alleged conspiracy? The answer must be in the negative. We do not at all accept the assertion of counsel for the Respondents that witchcraft is a recognizable societal fact recognized by law. We prefer to think that the belief in the phenomenon of witchcraft is a fact recognized by our society and our law. Whether it can make an aeroplane crash or cause a motor accident is a matter best left to pundits and not the law. Suffice it to state here that neither the Appellant nor Mariam would have been indicted for murder if the complainant had had a motor accident and died as a result thereof."

The section 251 offence is couched in these terms: "Whoever commits any act of witchcraft, magic or divination liable to disturb public order or tranquility, or to harm another in his person, property or substance, whether by the taking of a reward or otherwise, shall be punished with imprisonment for from two to ten years, and with fine⁵⁴⁷."

In spite of that long and involved sentence, the provision creates but one offence and not three offences, for the terms 'witchcraft', 'magic' and 'divination' are used not disjunctively but as implying similarity. In terms of the provision the act of witchcraft, magic or divination must be one liable (i.e. likely) either to disturb public order or tranquility, or to harm another in his person, property or substance (i.e. pocket) whether by the taking of a reward or otherwise.

The offence is not consummated if the act of witchcraft, magic or divination is not likely to lead to a breach of the peace, if it is not likely to result in physical injury to another, or if it is not likely to affect adversely the property or financial resources of another. Any act of witchcraft, magic or divination not likely to have any of these consequences (such as so-called 'white' magic which is said to be used only for beneficent purposes in contradistinction of so-called 'black' magic which is said to involve supposed invocation of evil spirits) does not fall within the purview of this section. For example, merely representing oneself as witch or wizard (e.g. the Wizard of Oz, or the Three Witches of Ipswich, or the Oracle of Delphi), sorcerer or fortune-teller, or the mere possession of charms, amulets or other articles associated with juju or witchcraft, or dealing in traditional pharmacopoeia by selling herbal cocktails, by healing snakebites, fractures, and certain forms of

⁵⁴⁷ From 5 000 to 100 000 francs. CF Fisiy, 'Containing Occult Practices: Witchcraft Trials in Cameroon,' *African Studies Review*, Vol. 41, No. 3 (December 1998), p. 143.

insanity are beyond the reach of section 251.

In some jurisdictions witchcraft, fortunetelling, sorcery, fraudulent mediums and so on are punishable as merely forms of fraud or cheating by tricksters or smooth-tongued frauds. By contrast, witchcraft under s.251 is punishable not as a miscellaneous fraud but primarily as an offence against public peace and then only if it is likely to have harmful effects. Witchcraft (or magic or divination) *per se* is not an offence. On the other hand, provided the practice of this art is likely to result in a breach of the peace or to be injurious to a person (e.g. where a man practices the art of becoming an incubus so as to have sexual intercourse with sleeping women; or a woman practices the art of becoming a succubus so as to have sexual intercourse with a sleeping man) his property or his wealth, it is a punishable offence and it makes no difference that it was just a one off thing or that there was no actual breach of the peace or actual harm to anyone or his property.

In *The People v. Remijus Njoku* (1996)⁵⁴⁸ the charge alleged that the accused “did commit an act of witchcraft liable to disturb public order by causing the shrinking of the penis of Sabum Christopher Fodje and thereby committed an offence contrary to section 251 of the Penal Code.” This ‘Penis-Shrinker’ case attracted much local attention but it was more out of curiosity than any indication that ‘causing the shrinkage’ of the penis (whatever that could mean, given that biologically that anatomical part of the male normally stays in a shrunk state anyway until sexually aroused) of that one person had the potential of leading to a breach of the public peace. The charge should have alleged that the act of witchcraft was liable to harm the person concerned in his person.

The offence under the section is thus not consummated where there is no showing that the act of witchcraft either was ‘liable to disturb public order or tranquility’ or was ‘liable to harm another in his person, property or substance’. Consider the case of *Ndam Phillip Mbab v. The People* (1999), where the appellant, the headmaster of a primary school in Batibo, was charged with and convicted of witchcraft by the Magistrate’s Court. The facts that gave rise to that charge are laughable. The primary school under the charge of the appellant had a farm in which food crops, including yams, were grown. The farm adjoins the compound of one Johnson Nimbah, the complainant in the case. Yams were routinely stolen from the school farm and in order to scare away the thieving individual the appellant and the school farm master decided to adopt a scare practice traditionally used by the people of the area. The scare practice consists of sprinkling wood ash on stolen property and displaying it where the thief would see. It was believed that the thief upon seeing the stolen item thus sprinkled with wood ash would come to some bad fortune.

The appellant and the school farm master then went to the house of the

⁵⁴⁸ Cameroon Post, August 27 – September 2, 1996, pages 1 and 3.

complainant and asked for and were given some wood ash which they then sprinkled on some yam tubers that had been dug out from the school farm but abandoned by the thief. The yam tubers thus sprinkled with wood ash were then taken to the school farm and exhibited in a conspicuous place so that they would undoubtedly be seen by the thief should he come back to the school farm to steal again. The next day the complainant laid a complaint with the police claiming that he saw ‘traditional medicine’ (meaning witchcraft paraphernalia) near his compound, that his family had become ill as a result of the ‘traditional medicine’ thus placed near his compound, and that he had confronted the appellant who admitted placing it there. When the police, the concerned parties and others visited the scene they discovered that someone else had made a palm frond shelter over the yams sprinkled with wood ash and had there placed an unspecified number of other items, some in bundles and some in bottles but whose contents were never disclosed.

The Bamenda Court of Appeal (Ngayi, Moutchia and Tume, JJA) held, (Tume, J. delivering the unanimous decision of the Court) reversing the decision of the lower court: (1) “that the elements of the witchcraft were never made out in the lower court [as] there was no evidence that the appellant had done anything to disturb public order or its tranquility. All he did was to put to practice a tradition that is used in the milieu where he lived to scare away thieves and to protect property”; (2) that there was no “objective test to show that use of wood ash was nefarious to [complainant’s] health or that of the population ... [and] no medical certificate was produced to attest to such effect”; and (3) that “the use of wood ash without more does not tantamount to the practice of witchcraft under section 251.”

On the facts of the case, it is patent that the specific conduct complained against as being an act of witchcraft (a common traditional practice of protecting especially farm crops from thieves) was not conduct liable to disturb *public* order or tranquility. Conceivably, the conduct in question was one liable to affect the personal tranquility of an individual, the thief, that is, but not that of the public. The practice was also clearly not liable to harm the complainant, except of course if he was the thief, in which case it could be said that the traditional belief in question by inducing belief in ill fortune befalling the thief, was an act liable to harm the complainant. But it was never contended, admitted or established that the complainant was the thief. The decision was thus on the facts and on the whole correct.

However, it is submitted that it is a misstatement of the law for the learned Justices of Appeal to have intimated that the offence under the section is not consummated without proof of disturbance or without medical evidence of harm to the complainant or the population; and that traditional practice can be availed of as a defence to a charge of witchcraft. Section 251 does not purport to outlaw witchcraft *per se*. It penalises any act of witchcraft *liable* to disturb or

to harm, not that the act must actually have disturbed or harmed. It is sufficient that the act was such as likely to disturb or to harm. It is therefore not necessary for the prosecution in order to secure a conviction under the section to adduce evidence of actual disturbance or to produce medical evidence of actual harm. Of course, if the act does disturb public order or tranquility or does harm another, the offence is *a fortiori* committed; but it is not necessary for the consequence of the act to attain that level for the offence to be consummated. Further, if an act of witchcraft is one that is likely to disturb or likely to harm it is hardly a credible defence to contend that the act is a traditional practice in the locality.

The Code offers no definition of ‘witchcraft’, ‘magic’ or ‘divination’. The entry in the Oxford Pocket Dictionary says witchcraft means ‘use of magic’, magic being defined as the “supposed art of influencing course of events by occult control of nature or of spirits.” Witchcraft is therefore a synonym for magic, sorcery, juju, enchantment or conjuration. It may take various forms. For example, it could take the form of trial by ordeal (such as the ordeal of fire, sassafras, hemlock or other poison, boiling water or oil, immersion in water); selling or using any drug or charm or article reported to possess the power of causing any natural phenomenon or any disease or epidemic, selling or hiring for reward any fetish or charm which is pretended or reported to possess power to protect against gun bullets or to protect against malefactors, or to aid or assist in any way in the preparation of any crime, or to prevent, hamper or hinder the detection of or conviction for any offence, or to assist in gaining promotion, access to any office or success in any sport, game or examination.

Witchcraft may also take the form of possession of any human remains used or intended to be used in connection with witchcraft, magic or divination. It is well known that there are many so-called ‘medicine’ people who prey on the popular belief in witchcraft not only to make a living but also to inspire dread in the community about the extent of their presumed powers and consequently legitimize their role in society.

Divination is a form of witchcraft that consists in foretelling the future by supernatural means, that is, having insight into the unknown or future by allegedly supernatural means. This includes fortune-telling, soothsaying, mediums, pretending to see future events by gazing in water or a crystal ball, pretending from knowledge of any occult science to be able to discover ‘enemies’ or where or in what manner anything supposed to have been stolen or lost may be found, or to be able to detect perpetrators of any crime. *Semle*, exorcism by magic is a form of witchcraft as well.

Where in any prosecution under section 251 it is proved that the person charged received or had in his possession a human head or skull within six months of the same having been separated from the body or skeleton, the law

presumes that the person charged received or had in his possession such head or skull with the intention of using it or transferring it to another person for use as forbidden by section 251 unless the contrary is proved⁵⁴⁹. Thus, in the prosecution of an accused under section 251, proof by the prosecution of recent possession by the said accused of a human head or skull raises a rebuttable presumption of guilty intent.

The government may by order prohibit the worship or invocation of any juju (i.e., fetish) that may appear to involve or tend towards the commission of any crime or breach of peace, or to the spread of any infectious or contagious disease⁵⁵⁰. Moreover, any house, grove or place in which it has been customary to hold any trial by ordeal which is unlawful, or worship or invocation of any juju which is prohibited by government order may, together with all articles found therein, be destroyed or erased upon the order of any court by such person as the court may direct⁵⁵¹.

⁵⁴⁹ Schedule III (B), section 56.

⁵⁵⁰ Schedule III (B), section 60(1).

⁵⁵¹ Schedule III (B), s. 60 (2).

Offences Relating to the Public Economy

Caveat emptor (let the buyer beware) is a familiar doctrine in the law of Sale of Goods. It has been used for hundreds of years, and continues to be used, to defeat the consumer's claim to legal satisfaction for faulty or harmful merchandise purchased. However, for quite some time now there has been an increased interest in consumer rights. There appears to be a perceptible shift from 'let the buyer beware' to 'let the seller/manufacturer beware'. For, nowadays, unscrupulous traders, artificers, dealers, salesmen and manufacturers can be held responsible for a wide range of consumer trade practices that operate to the detriment of consumers, or for breaches of contract or other civil duty in a way detrimental to consumers. The law seeks in this way to give consumers some measure of legal protection. This protection is reinforced by the criminal law, which imposes penalties for certain consumer-damaging practices or conduct.

§1. Keeping false weights and measures

Assessment by weighing and measuring is essential to commerce. It is essential to the service, the transport, the manufacturing and the building industries. The accuracy of weights and measures thus becomes a first duty of government.

Weights and measures play an important part in consumer-protection. They ensure fair and safe trading in commodities. They prevent deceit and promote safety. They give basic protection to both the consumer and the trader. They impose basic correctness in the essential attributes of goods on sale so that the consumer is protected from cheat, unfairness and hazard.⁵⁵²

A 'trader or artificer' is guilty of an offence under section 252 if he "keeps at his place of trade or work, any false weight or measure, or other incorrect apparatus used for the weighing or measuring of his wares."

Trader. 'Trader' means a person who earns money from selling goods. The term is wide enough to embrace 'merchant' and 'dealer'. But it does not cover a manufacturer or transporter. The descriptive term 'artificer' includes such skilled workmen as builders, carpenters, goldsmiths, publicans, tailors, bakers, and soap makers.

Keeping. Section 252 punishes the mere *keeping*, and not the use, of the false apparatus. The offence is one of possession; for what is punished is the

⁵⁵² See generally, J.A. O'Keefe, *The Law of Weights and Measures*, Butterworths, London, 1966.

physical possession of the forbidden object. The phrase 'keeping at his place of trade or work' refers to immediate physical control. It is unnecessary for the prosecution to show that the place where the false apparatus was kept was used *exclusively* for trade or work. So long as the premises were used as a place of trade or work it makes no difference that the same premises also served other purposes, such as a dwelling, for example. The offence appears to be based on the assumption that by keeping the forbidden object the trader or artificer necessarily uses it since, apparently, there could be no other credible explanation for its possession.

False weight or measure. This means weights or measures that are either incorrect or not genuine in that they give a wrong or faulty measurement of mass or length or capacity, as the case may be. But measurement in mass does not necessarily mean measurement by weighing machine. Measurement in length does not necessarily mean measurement by tape or ruler, for it can be by pacing or by length of the arm. And measurement in capacity does not necessarily mean measurement in litres or pints or gallons. The use of alternative methods for measuring weight or capacity does not necessarily mean that those methods are false weights and measures.

The ambulatory trader in pastry ('puff-puff', 'make-me-well' or other doughnut) does not measure his wares by scale. He sells them by the number of rolls or pieces requested by the customer. The foodstuff trader in Muea market does not sell his bananas, plantains, cocoyams or yams by scale. He sells them in convenient heaps (in the case of yams and cocoyams), in bunches (in the case of plantains), and in 'hands' in the case of banana fruits. The maize vendor in Bamenda market sells his wares by bags or 'kerosene tins'. The 'garri' or groundnut or beans dealer in Kumba or Tiko market sells his produce by 'cups', i.e. the cylindrical 50-cigarette cup in use since the days of British colonial rule. The 'koki beans' or groundnut paste trader sells his product in small bundles that are conveniently marketable. A victualler sells draught beer in pint glasses (pinta), but he also sells beer in bottles or cans of varying sizes. The bartender sells spirit by small quantities called 'shots' or by 'drams', which are smaller measurements called 'tots'. He normally uses a liqueur dispenser. But the 'chicken parlour' restaurateur may use a convenient small glass. Common sense dictates that it makes no sense prosecuting these traders for those honest and fair trade practices that are common and widespread.

Further, it is doubtful whether a trader can be convicted under this section if he keeps in his place of trade metric weight and measure when the country has adopted imperial weights and measures, or vice versa. On principle it seems not because imperial and metric weights and measures are not false or incorrect as such.⁵⁵³

⁵⁵³ The trader, in our hypothetical case, would be caught by s.R.369 (4).

Wares. The prosecution must show that the false weight or measure kept by the trader at his place of work was used for the weighing or measuring of his 'wares'. It is therefore a good defence that the apparatus was not so used. But if the apparatus was in fact used, it will be an idle defence to argue that the use procured no advantage to the accused. One would have thought that the word 'wares' is clear enough, and that the term simply means any articles for sale. In one case, however, it was intimated that 'wares' does not include foodstuff. That was in the case of *The People v. Njolai Cletus* (1979)⁵⁵⁴.

The charge in that case alleged that Njolai Cletus, at Kumbo market, being a trader in foodstuff to wit, maize, kept at his place of trade a false measure to wit, a twisted kerosene tin with a reduced capacity which he used to measure his maize instead of a normal kerosene tin and thereby committed an offence contrary to and punishable by section 252. In acquitting Njolai Cletus the Magistrate held that 'wares' does not include foodstuff. The prosecutor appealed against this ruling. The Bamenda Court of Appeal (Nganje, Mbuagbaw and Anyangwe, JJA) observed that the import of the appeal was for the Court to construe the meaning of 'wares' in s. 252. However, evidence before the Court was that the respondent was no longer alive. The Court ruled that the respondent having died it was not entitled to hear the appeal in the absence of the respondent. It accordingly dismissed the appeal. The ruling was consistent with the well-known principle in criminal procedure that the death of the accused results in the abatement of the criminal proceedings, i.e. the proceedings drop. Nevertheless, the Court should have, for the purpose of removing any lingering doubts as to the meaning of the term 'wares', gone ahead to put a judicial construction on it.

Punishment. The offence carries a penalty of imprisonment for from 15 days to 6 months and/or a fine⁵⁵⁵.

§2. Bad cheques

By section 253, "Whoever (a) issues a cheque on a bank or postal account within or without the Republic and without pre-existing, adequate or free cover; or (b) after issue withdraws, whether within or without the Republic, all or part of the cover or stops payment" shall be punished with the penalties laid down in s.318. Section 253 creates five distinct bad cheque offences, to wit,

- (i) issuing a cheque without pre-existing cover;
- (ii) issuing a cheque without adequate cover;
- (iii) issuing a cheque without free cover;
- (iv) issuing a cheque and immediately afterwards drawing out all or part of

⁵⁵⁴ (2000) 1 CCLR 1-125 Part 6, p. 90.

⁵⁵⁵ From 10 000 to 700 000 francs.

the cover; and

- (v) issuing a cheque and immediately afterwards stopping payment on it.

Cheque. A cheque is a draft for payment of money. It is an order, in writing, upon a bank or banker, for payment on demand of a specified sum of money to a certain person or to his order or to bearer. A cheque is characterized as 'bad' not because it is a dud or counterfeit but because it is not honoured when presented for payment. The beneficiary's real complaint is thus that the cheque has not been paid. So long as he can get his money he is little bothered by the conduct of the drawer before or after issuing the cheque.

Evading payment of a debt by means of a bad cheque. When a person draws a cheque he impliedly makes two representations. First of all, he represents that the cheque is a valid order for the payment of the amount stated in the cheque. If therefore he purposefully invalidates the cheque (e.g. by not properly writing it out or signing it, or by not signing it at all) then the cheque is not a valid order and the bank is perfectly entitled not to honour it. The drawer of a cheque may invalidate it as a way of evading payment of the amount stated in the cheque. In such a case, a prosecution for *theft by false pretences* could lie since there is no duty on the bank to honour an invalid cheque.

Issuing a cheque without adequate cover. The second representation the drawer of a cheque makes is that the existing state of facts is such that in the ordinary course he intends the cheque to be honoured. A cheque will be met if it is valid and the drawer is in funds. This second representation will thus be false if the drawer of the cheque, at the time of issuing it, had *insufficient* credit in his account to meet the amount drawn on the cheque. In that case the drawer will be guilty of *issuing a cheque without adequate cover*. It is therefore an offence to issue a cheque for an amount larger than the size of the account on which the cheque is drawn. If the drawer's account is in sufficient credit only because he has paid in cheques he knows are, or might be, worthless he is, *a fortiori*, guilty of issuing a cheque without adequate cover or of issuing a cheque without preexisting cover, as the case may be.

Issuing a cheque without pre-existing cover. If the drawer of a cheque, at the time of issuing the same, has no funds at all in the account on which the cheque is drawn (i.e., the account is zero or in the red) the crime of *issuing a cheque without preexisting cover* would have been committed. And it makes no difference that the account is subsequently replenished.

Different considerations of course apply (i) if the drawer has been allowed, by the drawee bank, an overdraft facility equal to or exceeding the amount stated in the cheque and he intends the cheque to be honoured out of the

overdraft, or (ii) if the drawer expects from his previous dealings with the drawee bank that the bank will honour the cheque although no overdraft has expressly been agreed, or (iii) if the drawer intends to pay in sufficient funds into his account and does pay in before the cheque is presented for payment. Either of these circumstances negatives criminal intent and would thus afford a credible defence to a charge of issuing a cheque without pre-existing cover.

Under (iii) the reason why the drawer cannot be convicted is that his representation, at the time of issuing the cheque, that his account has pre-existing cover, is a continuing representation until it is acted upon by the beneficiary, which is the time he presents the cheque for payment and by which time the representor (the drawer) had already put the account in funds.

Issuing a cheque and immediately afterwards withdrawing cover. Where the drawer's account is in sufficient credit and he issues a cheque on it but immediately afterwards withdraws the money from his account before the cheque is presented for payment that by itself and without more cannot be an offence. The drawer will be guilty of an offence only if the cheque presented by the beneficiary is dishonoured either for lack of funds or for insufficient funds. The fact that a drawer issues a cheque on an account does not mean he may not draw monies from that account until the cheque he issued has been honoured. The beneficiary's only interest, and that of the law in this area, is that the cheque be honoured; and so long as it is, no offence is committed even though the drawer may have been to the bank before the beneficiary and withdrawn money from his account.

The situation is altogether different where the drawer, secretly intending that the cheque issued by him be not honoured by the bank, withdraws some of the money from the account or in fact empties the account immediately afterwards and before the beneficiary has been to the bank. In such a case the account, as at the time of presentation of the cheque for payment, is empty or is in insufficient funds. The drawer would thereby have committed the offence of issuing a cheque and immediately afterwards drawing out all or part of the cover.

Stopping payment on a cheque issued. If after issuing a cheque the drawer then proceeds to *stop payment* on it for no legitimate reason, he would have committed an offence under s.253. In *Ekane Philip Ewang v. The People & Nwangu Michael* (1999)⁵⁵⁶ the appellant entered into a contract with the 2nd respondent by which appellant was to use 2nd respondent's business licence for timber logging at a monthly fee of 400 000 francs. The logging was to be in forest belonging to one Joseph Koye who had earlier authorized 2nd

⁵⁵⁶ (2002) 1 CCLR 1-123 Part 9, p.13.

respondent to do logging in that same forest. The appellant started logging the timber but soon fell in arrears on the agreed monthly fee. The 2nd respondent demanded three months payment as a condition for his further cooperation regarding the use of his licence by the appellant. Appellant then issued to the 2nd respondent a cheque dated 6 February 1993 for the amount of 1.200.000 francs. The 2nd respondent paid the cheque into his account. Two days later the cheque was returned with the comment that the drawer of the cheque (i.e. the appellant) had stopped payment on it.

These are the brief facts that formed the basis of the charge laid against Ekane Ewang accusing him of what the prosecution termed “cheque without cover contrary to s. 253 (1) of the Penal Code”. The 2nd respondent joined in the criminal action as a civil party and entered a civil claim by way of damages. The trial court discharged him but held that Nwangum’s civil claim succeeded.

Being dissatisfied, Ewang appealed to the Buea Court of Appeal (Najeme, Fonkwe and Fonjock, JJA). It was held that the appellant was guilty as charged and that the 2nd respondent’s civil claim would be dismissed on the ground of illegality of the contract entered into. In delivering the unanimous decision of the Court Fonkwe, J. stated: (1) that the law on bounced cheques is one of strict liability in that once issued, the cover must be maintained in the bank at the disposal of the drawee who may endorse the cheque to another beneficiary; (2) that under no circumstances should the cover be withdrawn, nor payment stopped of the cheque that was voluntarily issued and that the only situation where the law permits the drawer of a cheque to stop payment is when the cheque is stolen; (3) that the disputed cheque was intended to finance an illegal contract as the agreement to use, lease or hire Nwangum’s forest exploitation licence by Ekane was in violation of the law.

The learned Judge’s characterisation of a bad cheque offence as one of strict liability must, it is submitted, be considered *per incuriam* (mistaken through want of care). A strict liability offence is one not requiring fault i.e. there is liability even in the absence of *mens rea* (intention, recklessness, negligence). The Judge himself did recognize in the judgment that an offence under the section requires a criminal intent. Clearly, a person is not guilty under the section merely by reason of issuing a bad cheque. This fact renders nugatory the claim that an offence of issuing a bad cheque is one of strict liability.

Further, it is an over-statement to say that under no circumstances may cover be withdrawn, or payment stopped except where a cheque has been stolen. Supposing that **A** gives **B** a postdated cheque, why should **A** not be able to withdraw cover from his account to attend to some urgent business and then to replenish the account before the payment date indicated on the postdated cheque given to **B**? And supposing again that **D** issues a cheque to

E who turns out to be a wanted crook and for goods which turn out not to be of merchantable quality. Why may **D** not stop payment on the cheque?

Finally, a charge under s. 253 framed merely as 'cheque without cover contrary to s. 253' is bad for vagueness as the provision creates and punishes five distinct bad cheque offences. This point was surprisingly not taken either by defence counsel or the court itself.

Issuing a cheque without free cover. A drawer's account might be in sufficient credit. But if he knows that the account is frozen or blocked (for whatever reason) and he nevertheless issues a cheque on it, he would have committed the offence of *issuing a cheque without free cover*. So long as the drawer has funds in his account to cover the amount drawn on the cheque, the bank is obligated to honour the cheque. But if the account is frozen or overdrawn the bank is not obliged to honour the cheque. In fact where the account is frozen pursuant to a court order the bank cannot honour a cheque drawn on that account because to do so would be contempt of court.

Overdraft facility and other previous dealings with the bank. In deciding the question whether the drawer has insufficient funds or no funds at all, regard must be had to the existence and extent of any overdraft facility, if at all, granted to the drawer by the bank. Regard must also be had to the existence of any previous dealings with the bank whereby the bank habitually honoured the drawer's cheques although no overdraft had been expressly agreed. This may be the case where the drawer's weekly wages or his monthly salary is paid through the drawee bank. But even in such cases the drawer will be guilty of an offence under s.253 if he *issues a cheque for an amount that exceeds the overdraft facility* he is allowed or the agreed bank loan credit to his account, or exceeds his weekly wages or monthly salary paid through the drawee bank.

Furthermore, if the account was not in sufficient funds and the drawer intended to receive funds from somewhere and pay in and then a hitch occurs so that the cheque cannot be honoured when presented for payment the plea that the hitch was unexpected would avail him nothing, for in such circumstances he was taking some risk that a hitch might or might not occur so that his cheque might not be met, and that he knew the beneficiary would not have agreed to take the cheque if he believed there was even a slight probability it would not be met.

The use of bank cheque cards raises different considerations not covered by section 253.

Post-dated cheques. Another issue is the perennial problem of post-dated cheques. The drawer is aware at the time of issuing the cheque that he has insufficient or no funds in his account. He intends to honour his debt and

intends to replenish his account (e.g., payment of his salary or payment of some monies owed to him by a third party) by the time the beneficiary presents the cheque at the bank for payment. This sort of conduct clearly falls within the four walls s.253 since, at the time the cheque was issued the drawer's account was not in funds at all or was not in sufficient funds and, moreover, the drawer is taking a risk in that his account may in fact not be replenished, inevitably leading to his cheque being dishonoured.

The drawing of a cheque is clearly a representation by the drawer not only that the cheque is a valid order for the payment of the amount stated on it, but also that the cheque would be honoured on the date it bears. The drawer of a cheque, like every other promisor, impliedly represents his intention to fulfil his promise, i.e. to procure the payment stated in the cheque. Postdating a cheque may be a form of deception because more often than not the drawer of the cheque resorts to it as a means of evading a promise that he knows the other party thinks he is presently making.

Technically, the issuing of a postdated cheque is an offence. But if the drawer immediately afterwards puts the account in funds and the cheque is honoured when the beneficiary presents it for payment, it would be an oppressive prosecution to indict the drawer for issuing a postdated cheque, and in practice no such prosecution is ever brought. Postdated cheque cases are in practice prosecuted only where the cheque is not honoured when presented for payment.

Issuing a cheque. Section 253 is largely concerned with *issuing*, not with writing out, a cheque. A cheque is written out when the drawer states on it the amount (in words and figures) to be paid by the bank to the beneficiary, and then properly dates and signs it. The cheque is issued when after writing it out, it is then delivered, or caused to be delivered, by the drawer to a third party who accepts it and thus acquires a right against the drawer with respect to the cheque.

Section 253 is moreover concerned only with the specific bank or post office account on which a cheque is drawn, and not with all the accounts the drawer may have with the bank or post office. If the drawer issues a bad cheque on Account Number X, it is no defence to show that Account Number Y maintained by the drawer with the same bank or post office is in sufficient funds. The section does not however cover the case where the drawer no longer has an account with the bank as where the account has been closed.

The phrase 'within or without the Republic' is an unnecessary flourish. By s.8 of the Penal Code the criminal law applies to any offence of which any ingredient has taken place within the territory. Let it be supposed that a person issues a cheque to a third party here and then travels abroad. While there he

gives instructions to the drawee bank stopping payment of the cheque or he withdraws all or part of the funds in that account so that the cheque when presented cannot be honoured. He is guilty of an offence under section 253 and, if arrested here, can properly be tried and convicted.

Bad cheque as a mode of deception. In some jurisdictions bad cheque cases are prosecuted as species of fraud or deception rather than as autonomous crimes. The reason for taking a different approach in this country lies in the fact that the cheque is considered not as an instrument of credit but as something like money itself. Issuing bad cheques is like circulating counterfeit money.⁵⁵⁷ In contemplation of law, when the drawer issues a cheque he fully guarantees that it shall be honoured. It is therefore important to ensure that the cheque inspires full confidence in one who receives it. This calls for the prosecution of bad cheque cases as distinct crimes.

§3. Interference with auctions or tenders

It is an offence under s.254 to disturb in any way (whether by force, threat, gift, promise, trick, etc.) the freedom of any auction or tender. It is also an offence under the same section to interfere, in any way also, with the genuineness of any auction or tender. In either case the penalty is imprisonment for from 1 to 6 months and a fine⁵⁵⁸.

Section 254 is directed at the person who forcibly, or corruptly, or fraudulently interferes with the freedom and conduct of public auctions and tenders. Such interference prevents the free and lawful sale of property by the auctioneer at its fair value. The section catches the seller of goods put up for public auction who enters a bid, directly or indirectly, in an effort to push up the bidding. It also catches the bidder who bribes the auctioneer to knock down the gavel when the said bidder makes his bid. It is also an offence under the section to restrict the right to bid to persons who have agreed to buy the articles, or for dealers to agree not to bid against each other at an auction. Section 254 in effect penalizes the mock auction, i.e. an auction not conducted in good faith.

The section does not define 'auction'. Whether the term includes a 'Dutch auction' as well as an 'American auction' is an open question. But generally an auction is a process whereby a person, the auctioneer, sells or offers for sale goods or land where a person becomes a purchaser by competition, being the highest bidder. A bid is accepted when the auctioneer's hammer falls and thus a contract is created.

⁵⁵⁷ C Anyangwe, 'Dealing with the Problem of Bad Cheques in England and France,' *Criminal Law Review*, 1978, p. 30.

⁵⁵⁸ From 50 000 to 1 million francs.

The general principles relating to auction sales are clear.⁵⁵⁹ In the law of contract an advertisement of an auction is not an offer to hold it. At an auction the bid is the offer. The auctioneer's request for bids is merely an invitation to treat. The sale is complete when the hammer falls. Until that moment any bid may be withdrawn. An auction may be, and often is, expressly advertised as subject to a 'reserve price'. In that case there is no contract unless and until the reserve price is met. This is so even if the auctioneer knocks the goods down below the reserve price by mistake. The auctioneer is not liable for a breach of warranty of authority to sell at the price knocked down because the sale is advertised as being subject to a reserve price and this indicates to those attending the sale that the auctioneer's authority is limited. An advertisement to sell articles without any reserve price may be construed as constituting an offer to sell to the highest bidder. At any rate no contract of sale comes into existence if the auctioneer refuses to accept the highest bid. But in that case there remains the possibility that once the auction of an item has begun the auctioneer may be liable in damages on the basis of a breach of warranty that he has authority to sell, and will sell, the goods to the highest bidder.

§4. Interference with labour

It is an offence under section 255 to cause or to prolong, by means of force or threat or fraudulent trick, any concerted stoppage of work.

However, the offence is consummated only if the accused intended by such action to compel an increase or decrease of wages or to affect injuriously the freedom of labour or of industry.

The section does not punish strikes and lockouts *per se*, but only those procured by any of the three means stated in the section (force, threat, fraudulent trick) and with the requisite specific intent.

However, the effect of the section is to criminalize such industrial actions as picketing, boycotts, 'work to rule', 'go slow', wildcat strikes etc. undertaken for the purpose of forcing a wage increase. Some amount of force or threat is always involved in these forms of industrial action, and, invariably, industry or labour is always injuriously affected when such action is taken. Interference with labour is punishable by imprisonment for from 15 days to 3 years and/or fine⁵⁶⁰.

§5. Rigging prices

Section 256 provides, "Whoever by any fraudulent means causes an artificial increase or decrease of the price of goods or public or private securities" is guilty of an offence and punishable by imprisonment of up to 2 years and a

⁵⁵⁹ D Keenan, *English Law*, Pitman, London, 1992, pp. 204-204.

⁵⁶⁰ Of from 5,000 to 700,000 francs.

heavy fine⁵⁶¹. The penalty is double where the goods in question are foodstuffs. The section is concerned with the rigging of the price of goods and securities, not that of services.

This offence is intended to deal with cases of fraudulent or illegal speculation in goods and securities. A person offends against s.256 if he fraudulently rigs the market, that is, causes by fraudulent means an artificial rise or fall in the price of goods, shares, bonds or stocks in order to make illegal profits. The section does not penalize the normal commercial activity of speculating in goods and securities, that is, buying and selling them in the hope of making a profit (there is also the risk of losing money) through changes in their value. But the section catches the trader who buys up goods and stocks them, as well as the monopolist who hoards his wares, thereby creating an artificial scarcity which in turn induces an artificial rise in prices, before releasing the goods on the market.

What the section penalizes is speculation by fraudulent means. The prosecution must prove this element of the offence. It must also be shown that there was an artificial price increase or decrease. In order to discharge this onus the prosecution need only demonstrate that as a result of the fraudulent means used by the accused the price of the stated goods or securities rose above or fell below the normal price that would have been dictated by the usual interplay of market forces (i.e. the law of supply and demand) or international market trading.

§6. Destruction of foodstuffs

Section 257 punishes with imprisonment for from 1 to 5 years and with a fine⁵⁶², anyone who causes or permits foodstuffs (whether for human or animal consumption) to perish, rot or disappear from circulation, with intent thereby to influence the market in food commodities. The section catches hoarders who hoard food commodities in order to create an artificial scarcity and so push up prices. It also catches the farmer or trader who destroys foodstuffs so as to influence the market in these commodities.

⁵⁶¹ Of 20 million francs.

⁵⁶² From 50 000 to 1 million francs.

Offences Relating to Public Health

§1. Adulteration of foodstuffs etc.

To adulterate foodstuffs etc. intended to be sold. It is an offence under section 258(1) *to adulterate any foodstuff* (whether for human or animal consumption) *or beverage, or medicinal substance, intended to be sold*. To adulterate something is to make it poorer in quality by adding another substance. Milk, for instance, can be adulterated by adding water, palm wine by adding water and sugar, drug or medical preparation by adding any compound or substance that lessens its potency, efficacy or that changes its operation.

Adulteration is a health hazard because it makes the product noxious for food, or for drink, or for medication. The prosecution must thus prove that the foodstuff, or beverage, or medicinal substance, as the case may be, was adulterated. He must also go further and show that the accused *intended* to sell the adulterated product. It is unnecessary to prove that the product was actually sold.

To keep substance designed or fit only for adulteration. It is also an offence under the same section 258(1) *to keep any substance designed or fit only* for effecting the adulteration of foodstuff, beverage or medicinal substance, as the case may be. The substance must be one designed or fit *only* for the specific purpose of adulteration of foodstuff, beverage or medicine. This means that the offence is not committed if the substance could also be used for some other purpose. Substances that are designed or fit only for the specific purpose of adulteration of foodstuff, beverage or medicine and no other use must be very rare indeed. Most substances are capable of being put to multiple uses.

To keep for sale foodstuff etc adulterate or harmful to human health. Furthermore, it is an offence under section 258(2) *to keep for sale* any foodstuff, or beverage, or medication adulterated or deteriorated or harmful to *human health*.

Any of these three offences is punishable by imprisonment for from 3 months to 3 years and by fine⁵⁶³.

§2. Issuing false medical certificates

Section 259 deals with an aspect of intellectual fraud. It punishes any member of the medical profession (physician, surgeon, dresser or nurse, dentist, or midwife) who does any of the following acts:

- a. Falsely certifies the existence of any disease or disability;
- b. Falsely certifies the performance or result of an inoculation;
- c. Falsely conceals the existence of any disease or disability; or

⁵⁶³ From 5 000 to 500 000 francs.

- d. Gives misleading information on the origin of a disease, on the duration of a disability, or on the cause of any death.

Any such conduct represents a public health hazard in that the member of the medical profession concerned is concealing the true medical situation.

The list of the medical personnel given in the section is definitive not indicative. The psychiatrist, the clinical associate, for example, is not on the list and so does not come within the section. However, this does not mean that a psychiatrist or a clinical associate who issues a false medical certificate, for instance, will escape visitation by the criminal law.

He will be caught by s.315 (1), though he will get off with a comparatively light sentence. There the prescribed penalty is imprisonment for from 1 month to 1 year. But under section 259(1) the penalty is imprisonment for from 2 months to 3 years and a fine⁵⁶⁴. Where the physician etc. was corrupted to do any of the prohibited acts the penalty becomes imprisonment for from 2 to 10 years. Moreover, on conviction the court may additionally impose the forfeitures described in section 30.

§3. Facilitating the communication of infectious disease

Section 260(1) enacts: "Whoever by his conduct facilitates the communication of any dangerous infectious disease shall be punished with imprisonment for from three months to three years."

This provision punishes conduct that makes the communication or transmission of disease easier. To facilitate the communication of an infectious disease is to make easy the transmission of such disease. This would usually be by exposing others to the risk of catching such a disease. The offence must be construed as meaning conduct that creates a risk of communication of any dangerous infectious disease. Examples are cases of unprotected casual sex, circumcising many boys or girls using a single razor blade, tattooing many individuals using a single needle, administering medicine to or drawing blood from several persons using a single hypodermic syringe, or scarifying several persons using a single blade.

This section cannot be used to prosecute a person who actually communicates, as distinct from the mere facilitation of the communication of, an infectious disease. The section does not say 'whoever communicates ...' it says 'whoever facilitates the communication'

All the prosecution need show is that the conduct of the defendant was such as would make easy the communication of a dangerous infectious disease. If as a result of the particular conduct of the defendant a dangerous infectious disease is actually communicated then, in the absence of an appropriate offence in the Penal Code or any legislation on public health, a prosecution under the section would lie. A prosecution under the provision would lie not

⁵⁶⁴ From 5 000 to 100 000 francs.

because it is a requirement of the offence that actual communication of the disease be proved. It would lie on the theory that if mere facilitation of a prohibited conduct is an offence then *a fortiori* actually engaging in the prohibited conduct.

A person with HIV (Human Immune-deficiency Virus) or AIDS (Acquired Immune Deficiency Syndrome) or STD (Sexually Transmissible Disease) who has unprotected sex with another facilitates (i.e. creates the risk of) the communication of such infectious disease. If the infectious disease is actually communicated the conduct does not, *prima facie*, fall within section 260(1). However, if a person who knows he is HIV positive or who has AIDS deliberately infects another with it either through sexual contact or otherwise he may ingeniously be prosecuted under this section, in the absence of any HIV-specific or AIDS-specific criminal offence. The problem is that the prescribed penalty under section 260(1) is so benign compared with the gravity of deliberate HIV or AIDS infection that it is, as matter of justice, wholly inadequate.

This is a vivid reminder of the fact that although HIV and AIDS have been around for over thirty years there is yet in this country no clear relationship between these diseases and the criminal law, and no clear prosecution policy in the case of the conscious sexual transmission of HIV or other sexually transmissible disease. The only realistic option open to the ingenious prosecutor faced with a case of the deliberate infection of a sexually transmissible disease is to use the law of criminal assault.⁵⁶⁵

In order to secure a conviction under section 260(1) the prosecution must prove that the impugned conduct is one that *facilitates* the communication of a *disease both infectious and dangerous*.

The provision is not concerned with just any type of disease. It is concerned only with infectious disease. An infectious disease is one caused by bacteria, virus etc. that are passed on from one person to another. Such diseases include influenza ('flu'), malaria, cholera, dengue fever, tuberculosis, sexually transmissible diseases, and the human immunodeficiency virus, and the acquired immunodeficiency syndrome.⁵⁶⁶ The provision is further concerned with only those types of infectious diseases that are *dangerous* to human life. The term 'dangerous' in the provision necessarily means dangerous to human life. If this construction is correct, it is difficult to imagine any infectious or other disease that is not life-threatening *per se*, for every disease is by nature dangerous to life.

A distinct offence under section 260(2) is committed where a person

⁵⁶⁵ The use of the law of assault to prosecute cases of deliberate HIV infection is considered in the next chapter.

⁵⁶⁶ Cf. 'ebola', 'sas', 'E.Coli', 'H5N1' strain of 'bird flu' (the strain transmissible from one human to another).

facilitates the communication of an “infection dangerous to the life of any animal usually intended for human consumption”. This offence is punishable by imprisonment for from 1 month to 1 year. The words ‘any animal *usually* intended for human consumption’ refers to animals bred in captivity or normally captured for human consumption, e.g. poultry, goats, pigs, cows, fish, antelopes, deer, birds etc.

§4. Pollution of air and water

Section 261 is a rare provision in the Penal Code dealing specifically with an aspect of environmental protection. The section punishes the pollution of ‘drinkable water’ and the pollution of ‘the atmosphere’. Pollution is an environmental health hazard, a threat to human health from exposure to a disease-causing agent. It is only one among several genres of environmental harm to which human beings, fauna, flora and aquatic life may be exposed.

Pollution of drinkable water liable to be used by another. By paragraph (a) of that section, “whoever by his operations pollutes any drinkable water liable to be used by another” commits an offence. The word ‘operation’ does not seem apposite here; ‘activities’ would seem more appropriate.

Pollution. The prosecution must show that the defendant, by his activity, polluted drinkable water. To pollute drinkable water means to contaminate it, that is, to make the water dirty or impure by adding harmful or unpleasant substances. The offence is consummated only where what has been polluted is drinkable water liable to be used by another, as for example, the pollution of drinkable water in a receptacle at home or the pollution of drinkable water used by the community.

Drinkable water. Drinkable water is any water that is suitable or safe for drinking. Its source or provenance (e.g., pipe borne water, rain, spring water, or water in a stream or well or tank or catchment or reservoir) is immaterial so long as it is drinkable. However, some water is ordinarily non-drinkable water such as river, sea, lake, pond, or waste-household water, but could be made drinkable through appropriate technology.

‘Liable to be used’. The phrase ‘liable to be used by another’ means susceptible or capable of use by another, not that it is actually used. ‘Use’ is not confined to drinking. The law is indifferent as to any other specific use the drinkable water might be put to. The section does not say the drinkable water should be liable to be used only for drinking. Drinking water is always used for a variety of purposes other than just drinking, for example, for cooking, bathing, laundry, watering flowers and lawns, cleaning, and for the production

of various foods, beverages and medicines.

‘**Another**’. The prosecution must show that the drinkable water polluted by the defendant was liable to be used (for whatever purpose) by another. The offence does not catch the person who fouls any drinkable water used or likely to be used by the polluter himself. Nor does it catch the person who discharges or dumps pollutants into ordinarily non-drinkable water such as river, sea, lake, pond, even if such pollution renders such water unsuitable for recreational use and unsafe for aquatic life. It is regrettable that the criminal law seems indifferent to such environmentally unfriendly conduct.

Pollution of atmosphere rendering it harmful to human health. Section 261(b) penalizes anyone who by his activities “so pollutes the atmosphere as to render it harmful to human health.” The provision aims at preserving and protecting the country’s atmosphere from pollution or abuse so that people can continue to breathe clean air. Pollution control and waste management form one of the three key focal areas of domestic law regime of environmental law, the other areas being land-use planning and development, and resource conservation and utilization.

Section 261(b) clearly contemplates any form of pollution, whether by way of smoke or smell, that renders the atmosphere noxious to human health. Harmful industrial, automobile and aircraft emissions can be prosecuted under this provision. The discharge of smelling waste harmful to human health would also offend against the provision. The use of chemicals known to be toxic in nature could, conceivably, also be prosecuted under this section.

However, the offence is undesirably too narrow in scope as it contemplates only atmospheric pollution. The pollution of internal waters (territorial sea, rivers, streams, lakes, harbours, lagoons) is not caught by section 261(b). Thus the polluter who discharges pollutants into the sea at the waterfront in Victoria (such as SONARA allegedly does) or into the harbour at Tiko or Ekondo Titi, or into the River Manyu, Mezam or Donga Mantung cannot be prosecuted under the section. The punishment for polluting water or for polluting the atmosphere is comparatively benign: imprisonment for from 15 days to 6 months and/or fine⁵⁶⁷. This is clearly an indication of a lack of a full appreciation of the danger to human life of atmospheric pollution.

Section 261 directs attention to ‘whoever by his operations’. Apparently this would seem to imply that the offence envisages only natural persons. In reality, there is no compelling reason why the section should be interpreted as capable of catching only the polluter who is a natural person. Major polluters are industrial corporations. A corporation polluter may thus be convicted under this section. It is now settled law that a corporation may be held guilty

⁵⁶⁷ From 5 000 to 1 million francs.

of a crime. The penalty clause provides for the alternative penalty of a fine, and this penalty can be imposed on a corporation. Conceivably, therefore, SONARA may properly be prosecuted for continuing to flare gas in the course of its oil production or refining activities in Victoria because the gas flaring is a violation of the right to clean poison-free, pollution-free and healthy environment and ultimately a violation of the rights to life and dignity of the human person. Similarly, CDC may properly be prosecuted for the noxious and foul smell from its rubber factory at Tiko, causing as it does an environmental health hazard in the area.

§5. Breach of contract in essential services

Section 262 criminalizes the breaking of any contract in essential services without prior notice of at least seven days. The section provides in subsection (1): “Whoever breaks any contract of service or supply in such circumstances that the foreseeable consequences of such breach is either a grave danger to public health or to the health of patients in hospital, or grave bodily injury, or grave danger to property of any nature, or the deprivation of a number of persons of electricity or of water, shall be punished with imprisonment for from one to six months.” Personnel of the medical, police, electricity, water and sewerage, and waste management beware!

But the provision would seem also to outlaw individual or concerted wildcat work stoppage in ‘essential services’ because of the serious risk to public health that such action is likely to pose. In labour law and also in human rights law there is a right to lawful strike. Workers who take part in a lawful strike are not in breach of their employment contracts. They remain in employment and may not be dismissed by the employer. The contracts of workers employed in essential services may, however, stipulate that a strike would be tantamount to breach of contract. Even then, for the purpose of s. 262 the prosecution must go further to show that the breach of contract was in such circumstances as indicated in the section, for only then would the criminal liability of the strikers arise. A person is thus not guilty of an offence under the section by the mere fact alone that he has broken his contract relating to essential services.

The period of prior notice is intended to allow the relevant authority time to take steps to make alternative arrangements to keep the essential services going. If the accused gave prior notice of seven days or more before breaking the contract, he has a good defence under subsection(2) of the section, for it stipulates that subsection(1) “shall not apply to any person who has given notice of seven days or more.” In any case, no prosecution in respect of the offence under the section may be instituted except by or with the consent of the director of public prosecutions.⁵⁶⁸

⁵⁶⁸ Schedule III (B), section 46 (1).

Offences against Public Decency and Sensibilities

Crimes against morality and the family may be broadly grouped into four categories: offences against public decency, sexual offences, indecency with young people, and crimes against the family. This area is one of those in which law is used to reflect moral considerations and to enforce society's shared minimum standards of decency and morality. The offences here are in the shadowy zone where individual freedoms especially sexual freedom, clash with public concern, and where society's many interests conflict.

§1. Safeguarding public decency

The offences under this head are crimes deemed to be an affront to customary standards of decency and morals, an affront to the community's feelings of decency.

1.1 Public indecency

Section 263 penalizes rather cryptically anyone who "publicly offends against decency". The penalty for the offence is imprisonment for from fifteen days to two years and/or a fine⁵⁶⁹.

General. In terms of section 263, a person commits 'public indecency' when he 'publicly offends against decency'. That is not a very helpful formulation. In view of the fact that there is no clue as to what the conduct element of the offence consists of can it be argued that any act that publicly offends against decency suffices no matter how trivial or trifling in nature it may be? Or must the act be of a sufficiently serious or reprehensible character to merit punishment in the interest of society? There is no helpful body of case-law or academic opinion on these points.

It is submitted that the formulation of the crime is so vague as to be inconsistent with the principle of legality enunciated in section 17. The way the offence is couched does not enable one to ascertain the precise conduct the offence seeks to forbid. Worse, the offence is so nebulous as to lend itself to arbitrary enforcement. For example, does topless bathing, or sunbathing on a public beach, or a striptease show in a nightclub fall within the prohibition of section 263? Confronted with a case like any of these a liberal minded judge may well rule that depending on certain circumstances such as the place, time, duration, and nature of the conduct, these acts may be considered as an exercise of the right to freedom of expression.

⁵⁶⁹ From 10 000 to 100 000 francs.

It is perhaps an answer to the above criticism that any person of common intelligence knows or can ascertain the general sort of conduct prohibited by the section and that this element of *scienter* (knowledge) is sufficient to render the otherwise vague section acceptable under the principle of legality. Thus, although there is no presumption that everyone knows what is decent, it cannot be seriously argued that the reasonable man in society does not know what conduct or act would deprave the morals of others or outrage the sense of decency and propriety of members of the particular society. In other words, people know, at least in a general sort of way, what is indecent in the public's eye.

Indecency. Any form of indecency in public (whether by act, conduct, gesture, expression, behaviour, writing, drawing or talk) constitutes the crime. But the commonest ways in which it is committed are by exhibiting one's sexual organ in public (i.e., appearing naked in public), by having sexual intercourse in public, and by the exposure by a person of any erotic part of his/ her body in public. It is thus possible to lay a charge under this section against the sexual deviant (transvestite, peeper, voyeur, exhibitionist, sodomite, pederast, paedophile, necrophile, homosexual, lesbian, fetishist) whose conduct takes place in public. It can be said that the section in fact prohibits anything done in public that is *contra bonos mores* (against good morals).

In order to secure a conviction under the section the prosecution must show that the actual conduct complained of offends against decency. To offend against decency means to be repugnant to the customary standards of modesty and propriety of that particular society. Questions of morals are place and time specific. There, in order to determine whether the conduct complained of offends against decency, the court would always have regard to the effect of the said conduct, at that particular time and place, on the average reasonable member of the particular society who is neither a prude nor a libertine. It would view the conduct in the light of standard of moral conduct generally accepted as the norm in the society.

Public-ness. A critical requirement of the offence is the element of public-ness. The defendant's conduct must have taken place in public, and it must be shown that the defendant appreciated this fact. The impugned conduct is public if it took place in a public place or in a place open to the public. The conduct is also public if it took place in a private place in circumstances that it could be perceived by those to whom the private place was open or by members of the public from either a public place, such as a road, or even from some other private place, such as a dwelling. If A invites people to his home and improperly exposes his body to them he is as much guilty of publicly offending against decency as the person who does the same act in the street, or

the naked exhibitionist at a window or door, or on a balcony adjoining the street, or at the beach or in a park.

Where it is alleged that the impugned conduct took place in a private home and was seen by people from some other private place, it must be shown that these were ordinary members of the public. The accused cannot be held criminally liable on account of the nuisance committed opportunistically by Peeping Tom who peeps through a window or other aperture at a woman undressing, or who hides in a thicket and peeps through an opening at women bathing in a stream. However, a private detective, or a moral censure TV programme such as *Cheaters*, recruited by a suspicious spouse to make *un constat d'adultère* (i.e. attest to the fact that adultery has been committed), who peeps through an opening into a room where the other spouse is in bed with X or uses electronic surveillance cameras for that purpose, does not commit the crime as his intrusion is a bona fide attempt to obtain evidence of adultery which the suspicious spouse wants to use in a subsequent divorce case. Provided that the indecent conduct is public and that there is a reasonable possibility that the public may see, hear or otherwise perceive it, it is immaterial that it is not actually perceived by more than one person.

1.2 Corruption of morals

A person is guilty of corruption of morals when he publicly utters any immoral song, cry or speech, or when he draws the attention of the public to any occasion of immorality (section 264). The offence carries a like punishment as the preceding one. There are two distinct offences here: (a) publicly uttering an immoral song, cry or speech; and (b) drawing the attention of the public to any occasion of immorality.

‘Song, cry or speech’. There must be uttered some sound in the form of song, cry or speech, not writing, drawing or conduct. Dirty dancing in public, showing a pornographic film in a public place or a place open to the public, publishing a piece of immoral literature, and the public exhibition of a collection of immoral paintings or drawings or pictures or sculpture do not fall within section 264(a).

The song, the cry or the speech must be immoral (i.e., not conform to accepted standards of morality) and uttered in public (i.e., a public place or a place open to the public) or in a private place but intended to reach the public. The conduct is a crime only if it is public because presumably more public harm would likely result when the conduct is in public than when it is in private.

Immorality. A crucial element of the offence is the requirement of immorality. The song, cry or speech must be objectively immoral. What is

immoral is a question of fact for the court to determine bearing in mind the accepted current moral standards of the society. Like decency, morality is place and time specific, though of course there is probably a universal minimum standard of morality, that is, a traditional morality that is the basis of crimes *mala in se* (acts which are wrong in themselves). Beyond this traditional morality common to all mankind, however, standards of morality are not the same all over the world, and what is prohibited in one era or place may be permitted in another. The process of moral change is faster in some societies than in others, and some societies are more permissive, at least in some matters, than others.

A song, cry or speech is not necessarily immoral just because it is overtly sexual or sexually titillating (although in most cases that would probably be the case, including, of course, cases of hard-core pornography).

And, in fact, a song, cry or speech may be immoral even though it bears no taint of sexual impropriety at all. Sexual overtone is thus not the defining character of the act or conduct. It is sufficient that the publicly uttered song, cry or speech is immoral whether in terms of sexual or non-sexual morality. A song, cry or speech involving odium or containing vulgar abuse or expressing lasciviousness may constitute the offence. A publicly uttered song, cry or speech advocating, for example, slavery, 'abortion on demand', the killing of twin or handicapped babies or members of a particular community, or suggesting that suicide is good or honourable, would be no less immoral than a publicly uttered song, cry or speech advocating sexual promiscuity, incest, or unnatural sexual indulgence.

When preferring the charge the attentive prosecutor would indicate the specific form that the impugned conduct took, i.e. the form of a song, a cry or a speech. A statement of offence that merely recites that the accused 'publicly uttered an immoral song, cry or speech' would be bad for vagueness.

Drawing attention to any occasion of immorality. Paragraph (b) of section 264 makes it an offence to draw the attention of the public to *any* occasion of immorality. It is immaterial how the occasion of immorality arose or who brought it about. It is equally of no moment that the occasion of immorality was private or public. The common situation is that in which some immoral occasion (e.g., dogs mating at some street corner, an insane person going about naked, 'heavy petting' by lovers inside a parked car or at a street corner) is taking place in public and a person draws the attention of the public to it (by words, sound, sign or gesture).

But the crime is also committed where a person stages an immoral play or screens an immoral film, or where a person is engaged in some immoral occasion at a place and time as to draw the public's attention to himself, e.g., an exhibitionist who exposes his person to the public, lovers cuddling and fondling in a bus, train or street corner. If the attention of only one person

were drawn to the immoral occasion, the requirement of public-ness would not have been satisfied. One person does not constitute 'the public'. But, arguably, where two or three persons are gathered they constitute 'the public'.

The crime of 'corruption of morals', like that of 'public indecency', is concerned with behaviour or conduct that is public. This would suggest that the legislator considers that in these matters the private sphere of morality is not the concern of the law. Thus, to privately offend against decency is not a crime under section 263; nor is uttering an immoral song, cry or speech in private an offence under section 264. Still, the offences under these two sections, together with those under section 265, make it increasingly difficult to draw a line between what is and what is not permissible in literature and in public performance on the stage and screen. It may however be pointed out in extenuation that these offences are seldom the subject of prosecution.

1.3. Obscene publications

Definition. An obscene publication is any writing, picture or object liable to corrupt morals.⁵⁷⁰ A person who, with a view to trade either manufactures, keeps, imports, transports, or exports such publication commits an offence.⁵⁷¹ A person also commits an offence if he exhibits or distributes, whether or not for gain and whether or not publicly, any such publication.⁵⁷² It is also an offence to send by the post any document or other article not authorized by the legislation in force, or to provide a false declaration of the contents.⁵⁷³ This offence, benignly punished, seeks to protect the right of persons to be free from the receipt of prurient material.

Manufacture, keeping, importation, transportation, export of obscene publication. Section 265 creates not one but several crimes relating to obscene publications. Under paragraph (a) of subsection (1) there are five distinct offences: the *manufacture* of an obscene publication, the *keeping* of an obscene publication, the *importation* of an obscene publication, the *transportation* of an obscene publication, and the *export* of an obscene publication.

In each case, however, it must be shown that the act was done 'with a view to trade'. This is an important rider. Firstly, the subject of prohibition here is not the obscene publication as such, but trading in the same. For example, sending obscenity to willing purchasers through the mail (including the Internet), importing obscene material into the country from abroad, producing obscene material (such as child pornography through the Internet or Penthouse-type pornography) for sale. The law correctly takes the view that it

⁵⁷⁰ Section 265.

⁵⁷¹ Section 265 (1)(a).

⁵⁷² Section 265 (1)(b).

⁵⁷³ Section R. 370 (8).

would be immoral to allow a person to make a living out of trading in obscene publications. Such a source of profit or benefit is no less ‘immoral earning’ than the case of the pimp or pander who lives on the earnings of the prostitute.

Secondly, mere possession of an obscene publication or *objet d’art* in the privacy of one’s home is not within the section 265 prohibition. Thirdly, the prohibition against the use of obscene publications as a source of income or emolument removes any incentive that would otherwise exist to either manufacture, import or export such material, especially in large quantities for, and liable to corrupt the morals of, a wide public.

Exhibiting or distributing obscene publication. Paragraph (b) of subsection (1) creates two offences: *exhibiting* an obscene publication, whether or not for gain, and whether or not publicly; *distributing* an obscene publication, whether or not for gain, and whether or not publicly.

The prohibition against exhibiting or distributing obscene publication is absolute. It is thus no answer to a count in a charge laid under this provision to plead lack of public-ness or absence of a lucrative motive. A person who displays (free or on payment of a fee) in his private home any obscene publication (e.g., posters or photographs or videos of nude persons, salacious books, obscene *objets d’art* of the Picasso-type) commits an offence; and so too the person who privately circulates, free of charge or for payment, any obscene publication.

Would the sculptor who displays obscene *objets d’arts* or the painter who exhibits obscene paintings for sale, be caught by this provision? Undoubtedly! But the provision is never used, in part because society has become more and more permissive and because works of art are generally seen as a form of expression and culture. A person who public puts the Afo-akom statue on display or who publishes pictures of it over the Internet is unlikely to be bothered by the law.

The law should probably not poke its nose into what may be considered the private sphere of morality. But here this is not an entirely private sphere of morality. And even if it were, moral discipline, it has been said, is necessary to the resilience of a people as physical discipline is to an athlete.

Liable to corrupt morals. An offence under section 265 is committed whether or not the obscene publication did in fact corrupt morals. No actual corruption of morals is required, but only that the writing, picture or object is *liable* so to do. This means that judging from the common moral standards of this society the obscene publication should have an objective tending to corrupt morals. Since intention is the mental element required for the offences here (which means the intention of the accused must refer to all the

ingredients of the offence), it must be shown that the accused appreciated that the writing, picture or object may tend to corrupt morals.

Individual freedoms v. public concerns. As already noted, here we have one of those areas where individual freedoms and public concerns clash. Where is the line to be drawn between what is and what is not permissible in literature and in public performance on the stage and screen? In a world crowded with people with conflicting interests, no freedom can be absolute. But it is also clear that inability to speak and write and produce and publish freely is inconsistent with basic human rights. Section 265 in effect censors any form of artistic creativity that is 'liable to corrupt morals'. A justification for this censorship is probably that in exercise of the police power, the public has the right to protect itself from harmful writings, salacious books, obscene magazines, and from screen and stage performances that are offensive to public morals or to accepted standards of decency.

However, nowadays there is an increase in the amount of printed matter on the newspaper kiosks and in bookshops that will certainly qualify as obscene and pornographic. Furthermore, in recent times dirty dancing, lascivious songs and sexually titillating movies are the common menu of big screens and television. In trying to enforce a provision such as section 265 the courts must strike a delicate balance between the public's right to read and watch what it chooses and its right to protect itself against material that is offensive by the standards of this society.

Punishment. A person guilty of an offence under section 265 is liable to imprisonment for from 1 month to 2 years and with fine⁵⁷⁴. The court may also order closure, for up to 1 year, of the establishment where the offender manufactured or kept any such writing, picture or object. The conduct penalized by section R.370 (8) constitutes a mere summary offence punishable by imprisonment for from 5 to 10 days and/or fine⁵⁷⁵.

1.4. Other objectionable publications

While s.265 prohibits and punishes trading in, distributing of and exhibiting 'obscene publications', s.266 prohibits and punishes 'other objectionable publications'. The latter publications are 'objectionable' either on the grounds of a perceived obscenity or indecency (publication of the suicide of an under-aged, publication of the details of the execution of a death sentence, publication of the circumstances of a crime against morals or bodily integrity or the child), or on the grounds of mere policy considerations (publication of the account of certain matrimonial proceedings, publication of the account of

⁵⁷⁴ From 10.000 to 100.000 francs.

⁵⁷⁵ From 4.000 to 25.000 francs.

any prosecution for abortion). Section 266 thus creates five distinct offences, each attracting a different penalty.

Publication of account of certain matrimonial proceedings. It is an offence under section 266(1), punishable by fine⁵⁷⁶, for anyone to publish any account of proceedings relating either to affiliation, divorce, or judicial separation. It would seem to be the case that the ‘publication’ contemplated here is newspaper or other written publication such as Internet or cell phone text message (SMS). The publication need not be a full account of the proceedings to warrant a prosecution; a summary or partial account suffices. Where, however, the publication is of the *judgment* relating to any of these proceedings no crime is committed. Oddly enough the prohibition against publishing certain matrimonial proceedings does not extend to proceedings relating to custody, maintenance, separation, or nullity of marriage where these are not incidental to divorce.

Publication of account of prosecution for abortion. It is also an offence punishable by a like penalty as in the preceding offence for anyone to publish any account of any prosecution for abortion. It would seem to be the case here also that what is contemplated is written publication. So long as the publication is written (newspaper, hand bill, Internet, SMS) it is immaterial that the account is only a small part of the full abortion-prosecution proceeding or a mere summary of it. It is however a defence that what was published was the judgment relating to the prosecution for abortion.

Publication of the suicide of a person below 18 years of age. A person who publishes *in any manner* the suicide of an under-18 commits an offence against section 266(2). The words in italics mean that the way in which the suicide is publicized is immaterial. It may be verbal, such as passing word around about the suicide of a person aged below 18 years. It may be in writing (newspaper, bills, SMS, Internet) or by way of photograph or video. A person will be caught by this provision who prints an account of the suicide of an under-18 with or without a photograph of the deceased, or if he simply prints or exhibits the photograph of the deceased as he was found after committing suicide (e.g., hanging on a rope with the noose around his neck, lying in a pool of blood with his throat or wrist slit or his brains blown off as a result of a gunshot). If the accused was a person above the age of 18 years that fact constitutes a good defence.

It is a general defence to a charge under s.266 (2) that the publication was made with “the written permission of the authority responsible for

⁵⁷⁶ From 25 000 to 6 million francs.

prosecution.” The offence is punishable by fine⁵⁷⁷. On subsequent conviction, however, the recidivist may be sentenced to imprisonment for from 2 months to 2 years.

Publication of the execution of a death sentence. It is an offence under section 23(3) and punishable under section 266(3) for the *press* to publish anything “beyond the official record of the execution [of the death sentence] and any official communiqué that may be released.” In this country the death sentence is carried out either by shooting or by hanging, and it may be public or otherwise. The court specifies the manner of execution in its judgment. Publication by the press of the hanging or shooting, in public or otherwise, must be confined to the official record of the execution and any official communiqué that may be released. The press cannot go behind the news, dig out more about the execution (even under the thin disguise of investigative journalism) and publish it supposedly in the public interest. The offence targets the media. But of course it is the newspaper editor (together with the reporter) who would be charged, convicted and sentenced. The offence is punishable by fine⁵⁷⁸.

Publication of the circumstances of violent crime or offence against morals or a child. By section 266(4), “whoever publishes, whether by picture or in any other manner, without the written request of the officer preparing prosecution, the whole or any part of the circumstances of an offence of violence or committed against a child or against morals, shall be punished with fine⁵⁷⁹.”

It is an answer to a charge under this provision that the publication was made at the written request of the prosecuting officer, in other words, that the officer in writing requested the publication in question to be made. The phraseology of the defence would appear to suggest the publication should have been made at the behest of the prosecuting officer, that is to say, the initiative to have the matter in question published has to come from the officer referred to. But there is no reason to suppose that the defence would fail where the defendant sought and obtained the officer’s fiat before making the impugned publication.

1.5. Justification of crime

Any person who ‘publicly justifies’ murder, depredation, arson, destruction, aggravated theft, or any crime against the security of the state is guilty of an

⁵⁷⁷ From 20 000 to 2 million francs.

⁵⁷⁸ From 10 000 to 1 million francs.

⁵⁷⁹ From 20 000 to 200.000 francs.

offence punishable by imprisonment for from 1 to 5 years and/or fine.⁵⁸⁰ This is a rather nebulous offence. Although it is classified as an offence against public decency, the mischief aimed at is not clear. Furthermore, there does not appear to be any underlying rationale or logic for choosing the crimes listed in the section as those which may not be ‘publicly justified’. If the interest this particular offence seeks to protect is public decency then the prohibition should have been extended to all crimes, or at least, to all felonies and misdemeanours. In other words, it should simply have been made an offence to ‘justify’ any felony or misdemeanour, rather than just a few crimes apparently selected at random and arbitrarily. For, why should it be an offence to publicly ‘justify’ this and not that crime?

The formulation of the offence under section 267 has the strange consequence that it is an offence to publicly ‘justify’ murder but not an offence to do the same thing in respect of capital murder or grievous harm; that it is an offence to publicly ‘justify’ aggravated theft but not an offence to do the same thing in respect of theft *simpliciter*; that it is an offence to publicly ‘justify’ arson or destruction but not an offence to do the self-same thing in respect of rape, public indecency, official corruption, slavery, sexual offences and so on.

There is yet another problem with the formulation of this offence. The problem relates to the term ‘justify’ used in stating the required conduct element of the offence. To justify something means to show that it is right, reasonable or just. A crime by definition is a wrongful or unlawful act. An apology or explanation of a crime is possible. But the commission of an offence cannot be shown to be right or just. It follows that a person cannot justify a crime. At best, he can only attempt to do so. Even then he would legally be attempting the impossible. The concept of justification as a general defence in criminal law is a different proposition altogether. To speak of a ‘crime’ being legally justified is simply a compendious way of saying that the conduct or act only appears to be a crime and that it is, in contemplation of law, not a crime because it was in fact ordained by the law itself. Legal justification converts an otherwise factually unlawful act (an offence in fact) into a legally lawful one (a non-offence in law).

§2. Safeguarding public sensibilities

2.1. *Desecration of graves and corpses*

“Whoever (a) violates any tomb or place of burial; or (b) offers indignity to any human corpse or part thereof, whether buried or not” is guilty of an offence under s.274 and punishable by imprisonment for from 3 months to 5 years and a fine⁵⁸¹. There are two distinct offences in this provision: violation of graves, and

⁵⁸⁰ From 10 000 to 20 million francs. Section 267.

⁵⁸¹ From 10 000 to 100 000 francs. Section 274.

violation of corpses.

Violation of grave. Violating a grave consists in desecrating, interfering or damaging in any manner whatever a human grave. The crime comes from the Roman *sepulchri violatio* (violation of sepulchre), by which the violation or desecration of *res religiosae* (religious objects) was punished.⁵⁸²

A grave is a hole dug in the ground or any other place for a dead body even if cremated. Whether it is called a tomb, vault, sepulchre, or columbarium, a grave includes any monument or structure over, or stone on top or at the head of it, such as a gravestone, a tombstone, cenotaph or similar monument.

A ‘place of burial’ on the other hand is any area of land used for burial and known as a cemetery, churchyard, or graveyard, necropolis, or any spot wherever on which a person is buried. If a person is buried in front of or behind a house, in the bush or in the forest, the spot on which he is buried is a place of burial if others have been or will be buried there. If only a single person is buried on a particular spot that spot is the deceased’s place of burial but not a place of burial.

The manner in which the grave is violated is immaterial. The violation may relate to the inner or the outer portion of a grave. It may relate to the place of burial itself (e.g., trespassing on a cemetery). A person who desecrates a grave, such as by making obscene marks or drawings or other graffiti on it can be charged with violating a tomb. A person can also be charged with the same offence if he steals a gravestone or in any way injures the outer portion of the grave such as destroying the tombstone *in situ* or ripping off the marble used in building the tomb or removing, defacing, cracking or knocking the tombstone to the ground or damaging a columbarium. Equally guilty of the offence is the person who digs up a grave (even without touching the coffin or corpse in the said grave) or who tampers with the human remains, coffin, clothes or objects buried with them, inside the grave.

However, exhuming a human body is not an offence if sanctioned by statute or a court order.

Violating a corpse. To violate a corpse is to offer indignity to or to profane any human corpse or part thereof, whether buried or not. The rascal who kicks a human corpse violates it as much as the psychopath who dismembers or stabs it or the occultist who removes part of it or the necrophiliac who has connection with it or the cannibal who eats it up or any part of it.

A human corpse is a *res extra commercium* (a non-commercial object). It is therefore not a theftous object. Nor is it a saleable object. The ‘trader’ in

⁵⁸² CR Snyman, *Criminal Law*, op. cit. p. 356.

human corpse or parts thereof will be caught by section 274(1)(b)

Where a corpse is lawfully cremated and the cremated remains put in an urn and placed in a niche in a columbarium or placed somewhere else or buried in the family plot, a person who pours out the ashes in the urn or breaks the urn may possibly be convicted of violating a 'corpse'.

A human corpse is the lifeless body of a human being. A person is therefore guilty of 'violating a corpse' only where it can be shown that the person was already dead at the time the indignity was offered. For, strangely enough, indignity to the dead is a more serious offence than indignity to the living. In the ordinary run of cases the moment of a person's death is hardly in controversy. But time and again unusual cases do crop up. Consider the case of the patient with a brain damage who is then connected on a respirator; or the case of the comatose patient with a flat EEG (electroencephalograph) reading; or again the case of the irreversible brain damage patient who has merely a 'vegetable' existence. In all these cases, is the patient living or is he dead? Physicians used to define death in terms of heart death. Today, however, they appear to favour brain death: death occurs when the brain stem is dead.

An assault on, or some other dealing with, a corpse may be justified on the ground that it is 'in the interests of science'; provided such dealing is in accordance with regulations in force.⁵⁸³ The undertaker or mortician who embalms or prepares the dead for burial or cremation, the doctor who injects the dead with formalin, or the doctor who carries out an autopsy on a corpse, or those who exhume a corpse on the orders of the court, commit no offence.

A new body of law (called mortuary law) is growing up, especially in the United States, around the increasingly common practice of leaving all or part of one's body to a medical institution for research or transplantation. A person may direct that upon his death his body's organs should be donated to a hospital, eye bank, heart bank, kidney bank and the like for transplantation to living patients who might need it. The harvested parts of the cadaver donor are then stored for transplant to paying needy patients on a first-come-first-serve basis. But in law a dead person has no rights; and so 'he' has no right over 'his' body. Accordingly, such directions as a person may give regarding the disposal of his body upon his death are not legally binding on his family, or an executor or administrator of the deceased's estate. But the law would be inclined to honour such a direction 'in the interests of science', especially if there are no squeamish relatives who object.

If a body is unclaimed for a specific period of time after death, the state must bury it or it may donate the body to a medical school. The unclaimed bodies of people who die in such calamities as floods, hurricanes, earthquakes, tsunamis, nuclear disaster, plagues, genocide, pogroms, poison gas disaster (of the Lake Nyos type), and transport disasters present a great risk of

⁵⁸³ Section 272(2).

contamination and therefore a health hazard. Therefore such bodies may be buried or cremated by the state without delay and without identification or notification of next of kin.

Rationale. The reason for punishing violation of graves and corpses is that such conduct is an affront to society's feelings of decency. It is generally felt that the dead should be treated with some minimum decency, that the dead should be allowed 'to rest in peace', and that a person's 'final place of rest' should be protected against vandals and trespassers. Another basis for punishing the conduct is that such is also eminently an affront to the relatives and friends of the deceased. These are the ones most directly affected by any indignity to their departed 'beloved one'.

2.2. Disturbance of funeral

This offence is committed when a person (a) disturbs any funeral ceremony or procession; or (b) defaces any funerary monument; or (c) fails to perform any duty by which he is bound to bury or burn a corpse. Upon conviction for any of these offences the accused is liable to imprisonment for from 1 to 6 months and/or a fine⁵⁸⁴

A charge under section 273(a) can be preferred against a person who, for example, disrupts a funeral cortège, or a funeral service whether in a church or at the graveside, or possibly a 'cry-die' or 'wake keeping'. The offence under section 273(b) overlaps with the offence of 'violation of a tomb or place of burial'.

The basis for this offence is that it also offends against society's sense of decency. The acts here punished are moreover an affront to the family and friends of the deceased.

2.3. Cruelty to animals

Cruelty to animals is criminalised not only because of any desire to protect and promote 'animal rights' but also because the law-giver considers such conduct revolting to public decency. The offence is committed when a person "causes needless suffering to any animal, whether domestic, tamed or kept in captivity."⁵⁸⁵

The suffering may be caused by commission, as where **A** keeps a monkey permanently tethered and caged, or by omission as where **B** starves his cat or where **C** fails to take his sick dog to the veterinary clinic. It may be caused by **X** acting through the instrumentality of **Y** or some other agency.

The animal must be seen to be suffering (i.e., in pains or agony) and that

⁵⁸⁴ From 5.000 to 25.000 francs. Section 273.

⁵⁸⁵ Section 268 (1).

such suffering is ‘needless’. In *Kaffa David v. The People* (1982)⁵⁸⁶ the defendant inflicted a wound with a machete on the left leg of a cow. The animal bled for a whole day and eventually died of the machete wound.

If a dog has a broken leg, which is then amputated by the veterinary doctor, it is bound to suffer for some time while the wound heals. This is a case of ‘needed’ suffering and not ‘needless’ suffering. ‘Animal’ here means any living thing that can feel and move voluntarily, excepting humans. Accordingly, birds and fish are also animals.

Cruelty to animals is punishable by imprisonment for from 15 days to 3 months and/or fine⁵⁸⁷. On conviction the court may deprive the offender of ownership of the animal, or order the animal’s destruction if the condition of the animal dictates that as the proper order to be made.⁵⁸⁸

The general protection of animals is available under wildlife and fisheries legislation and section R.369 (1) of the Code. That section punishes with a fine⁵⁸⁹ “those who cause the death or injury of any animal or beast belonging to another person, as a result of straying of a dangerous person of unsound mind or a dangerous animal or as a result of the excessive speed, bad driving or overloading of any vehicle, horse, draught-animal, beast of burden or mount.”

⁵⁸⁶ Criminal Appeal No. BCA/2.c/82, unreported.

⁵⁸⁷ Of from 5.000 to 20.000 francs.

⁵⁸⁸ Section 268 1)(2)(3).

⁵⁸⁹ From 2 600 to 3 600 francs.

Offences Relating to Public Worship

Apart from the national constitution, international human rights instruments guarantee freedom of thought, conscience, religion, and freedom to manifest and propagate one's religion or belief.⁵⁹⁰ Underlying this guarantee is the conviction that religion and state should be kept separate from each other. This means a rejection of an officially established religion in the state. The offences under this chapter give additional protection to religious freedom. Section 269 protects the free exercise of religion; sections 270 and 271 protect the minister of religion, and section 272 protects the decorum, serenity and solemnity of religious worship.

§1. Protection of public religious practice

1.1. Forcing or preventing the practice of a religion

Whoever by any interference or threat compels or prevents the practice of any form of religion which does not involve the commission of a criminal offence, is guilty of an offence under section 269 and liable to imprisonment for from 1 month to 1 year and fine⁵⁹¹.

Two offences. The section creates two offences, namely, *compelling* the practice of a religion and *preventing* the practice of a religion.

‘Interference or threat’. What the section penalizes is compulsion or prevention procured by means of ‘interference or threat’, i.e., resorting to assault or to threat to force a person to or prevent a person from practicing a religion. The section does not penalize merely compelling or preventing, without more, the practice of a religion. Religious-minded parents take their children to religious worship of their persuasion. Traditionally, religions grow and expand by conversion through persuasion. There is nothing criminal in all this. What the section proscribes is the use of force or threats in getting anyone to or preventing anyone from practicing a religion. A crusade to forcibly ‘bring light’ to the ‘heathen’ or a *jihad* to convert ‘infidels’ would be an offence. The forcible creation of a kind of established church would also, it is submitted, offend against the section. So might be the case too where an educational establishment *compels* its students to practice any form of religion.

⁵⁹⁰ African Charter on Human and Peoples’ Rights, article 8; International Covenant on Civil and Political Rights, article 18; Universal Declaration of Human Rights, article 18.

⁵⁹¹ From 5 000 to 50 000 francs.

‘Any form of religion’. The phrase ‘any form of religion’ suggests that the draftsman had in mind not just major world religions such as Buddhism, Christianity, Hinduism, Islam and Judaism, but indigenous religions as well. Thus, there appears to be no reason to confine ‘religion’ to Christianity or Islam. The term is sufficiently wide to cover other recognized and regular forms of religion.

‘Not involving the commission of an offence’. Provided, of course, that any such form of religion does not involve the commission of a criminal offence. It is therefore not an offence to prevent the practice of a form of religion that involves the practice of human sacrifice, or that promotes violence as a means of achieving religious ends (e.g., religious fundamentalism), or that involves the practice of immorality (Satan worship), or that promotes individual or collective suicide by members (Doomsday cults), or that has self-flagellation or mutilation as a form of worship (e.g., Hindus, Shi’ite Muslims, the practice of certain Christians as some individuals in the Philippines who have themselves crucified during Easter).

1.2. Disturbance of public worship

“Whoever by disturbance or disorder obstructs, delays or interrupts religious worship in the place where it is customarily offered, shall be punished with imprisonment for from fifteen days to one year or with fine of from five thousand to one hundred thousand francs or both such imprisonment and fine.”³⁵⁹²

Section 272 protects only such religious worship as is conducted “in the place where it is customarily offered.” Where religious worship is conducted in such a place it is an offence: (i) to *obstruct* it, whether by disturbance or by disorder, (ii) to *delay* it, whether by disturbance or by disorder, or (iii) to *interrupt* it, whether by disturbance or by disorder.

The section protects the ceremony of worship rather than the congregation or persons lawfully assembled for religious worship as such. The protection attaches as from the moment there is ‘call to worship’. Until that moment there is only a gathering for religious worship and any disturbance of the group does not constitute an offence under the section. If the disturbance endures, the worship being unable to start on time as scheduled, the author of the disturbance can properly be charged under the section with having caused delay of religious worship.

⁵⁹² Section 272.

§2. Protection of minister of religion

2.1. Contempt of minister of religion

It is an offence under section 270 to strike a minister of religion on account of his religion. It is also an offence under the same section to *publicly* insult a minister of religion on account of his ministry. Such acts constitute contempt of that person in his calling. Either offence is punishable by imprisonment for from 1 month to 3 years.

A charge under the section would lie only where the minister of religion was struck or was publicly insulted, as the case may be, *on account of his ministry*. No offence is committed under the section if the minister of religion was not assaulted or publicly insulted because of his ministry but because he was, for example, caught abusing a child or sleeping with someone's spouse or concealing in his cassock an article he has just shoplifted. No offence is also committed under the section if a minister of religion is insulted in private even if on account of his ministry.

There is no definition of 'minister of religion' and no relevant authority on that expression in this country. It is thus not clear whether the term refers to a Christian clergyman such as a priest, a pastor, or a vicar; or whether it includes any person who performs religious ceremonies whether in a Christian or non-Christian religion. It is submitted that the latter construction is to be preferred. That would be consistent with the mischief that suggests the necessity of the offences under the chapter 'public worship'. It follows that in this context a minister of religion need not be a person who has special status or rank and need not be a person in holy orders as such. It is sufficient that he has recognized religious functions. There is no reason why a priestess, or a deacon, or an evangelist, or a preacher for example, would not be considered a minister of religion.

2.2. Violent obstruction of ministry

It is an offence under section 271 to obstruct *by assault* or *by threat* the exercise of his religion by a minister of religion. A person convicted of the offence is liable to imprisonment for from 1 month to 3 years.

While section 270 protects the minister of religion, *qua* religious leader, in his physical integrity and his dignity, section 271 protects him in the performance of his religious duties. If he is *obstructed* when performing the duties of his office (officiating in any place of religious worship or performing duties in the lawful burial of the dead or performing any other functions of a religious character), then the only other element the prosecution need to prove is that the obstruction was brought about by assaulting the minister or by threatening him, as the case may be.

Offences against Bodily Integrity: Non-Fatal Assaults

Human beings may demonstrate bravery and exude confidence. But they are fragile and inherently weak. They are generally vulnerable to each other. The degree of vulnerability varies according to the age, constitution and ‘cleverness’ of each person. But even the bravest, strongest and most cunning of men may become particularly weak and thus very vulnerable as when, for example, he is asleep, drunk, taken by surprise, sick, outclassed or outnumbered. The criminal law admonition, ‘thou shall not kill’ or ‘thou shall not harm’ thus aims at protecting the weak, which means practically every person, against injury by another person.

The law punishes not only the unlawful taking away of human life; it also punishes other forms of violence not resulting in death. In a general way it can be said that the law punishes assaults and threats against the person. In popular language assault connotes a physical attack or aggression such as striking, stabbing, pushing, or inflicting any hurt whatever on another. In fact, however, the term includes certain types of unlawful interference with another; hence expressions such as ‘indecent assault’, ‘sexual assault’, and ‘non-sexual assault’.

Historical. In some jurisdictions ‘assault’ is used as a generic expression to describe what in Anglo-American law is technically known either as ‘assault’ (that is, the threat by a person to inflict any unlawful force whatever, light or heavy, upon another raising an apprehension in the mind of the victim) or battery (that is, the actual application of any unlawful force whatsoever, be it ever so small, to another without his consent). That distinction between psychic and physical assault already existed in the common law of England as far back as during the Middle Age. The Roman law *injuria* (legal wrong) was much wider in scope. It included conduct nowadays punishable as assault. An *injuria* committed against another’s dignity was punishable as *crimen injuria*, and, against another’s reputation, as criminal defamation. Causing someone to fear physical violence was punishable as *injuria realis*, while actual physical violence against another’s bodily integrity was punishable as *injuria corpus*.⁵⁹³

Today, ‘assault’ is often used in statutes and ordinary legal discourse to cover the meanings of both ‘assault’ and ‘battery’, partly because ‘battery’ sounds archaic and partly because of lack of an acceptable verb formed from the noun battery for expressing the range of the offence. At any rate, physical assault is by far the commonest form of assault to come before the courts. ‘Assault’ and ‘battery’ have therefore been fused into the single category of

⁵⁹³ CR Synman, *Criminal Law*, p. 413.

assault crimes. Some assaults result in death, others not. A useful distinction can therefore be made between non-fatal and fatal assaults.

§1. Types of Non-fatal assaults

It is customary to distinguish between two broad types of non-fatal assaults, psychic and physical. However, there are in the Penal Code six types of non-fatal assaults, namely, simple threat, conditional threat, violence of a minor nature, slight harm, simple harm, and grievous harm.

Psychic assault. A *psychic assault* in its technical meaning is a threat to apply force on another's person in such a way that the victim believes that such force is about to be applied on him. The *actus reus* consists in the expectation created in the mind of the victim that unlawful force is *immediately* to be applied on him. The victim must expect that force is about to be applied on him. He need not experience fear, provided that he has that expectation. The *mens rea* consists in intentionally causing such expectation in the victim's mind.

Psychic assault is constituted notwithstanding that the threatener did not intend to apply the threatened force and could not, in fact, have applied it. The anticipated contact need not be dangerous; a threat to kiss or strike a person unlawfully would be enough. The gist of the crime lies in the effect the threat creates upon the mind of the victim. What is important is not how but whether the fear is put. There is no logical reason why fear raised by mere verbal threats (as distinct from mere verbal insults in themselves) may not be sufficient to lead to liability. This is the more so if the words are accompanied by menacing gestures and the threatener is sufficiently near to inflict the blow then and there.

Suppose that **A** says to **B**, "Be quiet or I will blow your brains out", pointing a gun at him a moment afterwards. That will be psychic assault. Suppose again that a highwayman says to **B** "Stand and deliver", at the same time pointing a gun; or he says "Your money or your life", but not troubling to pull out a pistol he is visibly carrying, because he is confident that his threat will exact compliance. Again that will be psychic assault.

There is in principle no reason why the law should not be the same where **A** telephones **B** and says threateningly, "Get off your house this moment, a bomb is due to go off in 30 seconds." If a man raises a shovel to a position where he can bring it down on his wife's head and says, "If it were not for neighbours outside I would split your head open", that would be a psychic assault, a conditional threat. But if a person makes a menacing gesture and utters emollient words quickly enough to destroy the momentary fear of the person threatened, he is not guilty of psychic assault.

Since in a charge of assault it is essential to prove that the person threatened expected that force would be applied to his person, it follows that it

is not psychic assault to threaten to strike a blind or sleeping person, or to threaten to kiss the Sleeping Beauty, or to threaten to strike a person who does not know or appreciate he is being threatened (e.g., he is not looking, he is drugged, or he believes it is all a joke). It is also not psychic assault to threaten to strike a person who is so out of range that he ought not reasonably to expect the application of force for this is similar to the case of a man on a moving bus or car who shakes his fist at another man standing on the road side. But if **A** kisses the Sleeping Beauty he is guilty of physical assault; and if he tries to strike **B** from behind who does not appreciate the threat, he is guilty of attempted physical assault.

In psychic assault it is not necessary that the victim's state of mind should be one of alarm or fear; he need not necessarily experience an emotion of fear. It is enough if he merely believes or expects the application of unlawful force. If it were material that the person assaulted should be put in fear (i.e., experience an emotion of fear) it would make an assault not dependent upon the intention of the assailant, but upon the question whether the party assaulted was a courageous or a timid person. This form of assault is therefore committed even though the person threatened may be stouthearted and may face the threat with stoic calm and fortitude.

Physical assault (battery). This requires some degree of force applied against the body of the victim. Poisoning a man's drink whereby he becomes ill, pulling away from one seeking to make even a lawful arrest, snatching an article from another's grasp (except if pulling of the article is known to involve injury or pain to the victim, as where an ear-ring is ripped from the lobe of the ear or a necklace from the neck), are not physical assaults (battery) though each may constitute some other crime.

However, provided force is applied to the body of the victim, physical assault is committed and it is immaterial that the force is small, slight or minor. This is so notwithstanding the maxim that the law does not take account of trifles (*de minimis non curat lex*). The least touching of another is a physical assault: spitting on a person, kissing a person without consent, bumping against somebody, grasping another's hand without consent, touching a woman's breasts ('boobs') or buttocks ('butt', 'behind') or any other part of her body without her consent, striking or kicking another. These are now punishable in some jurisdictions as 'sexual harassment'.

But not every touching is an assault. Due to the necessity of social intercourse, ordinary social contact is not an assault. For example, such ordinary contact as happens in a busy street, in a train, in a bus, in a taxi, in school, in a church, in a sports facility, in a crowded beach or market or shopping mall or bank, etc.

Physical assault can also be committed by applying light, heat, electricity,

gas, or odour to the victim, in uncomfortable quantities. To smoke a cigarette or pipe and puff out the smoke in somebody's face, or to fart in the presence of someone else, would probably be an assault if personal discomfort were thereby to be caused. There is an assault even when the attack is directed exclusively against the clothes that the victim is wearing, as where the assailant deliberately slits them.

Also, force may be applied indirectly as where the assailant frightens the victim who injures himself in trying to escape; or as where a person derails a passenger train, or rides over a person with a horse, or 'parks on a copper's (policeman's) foot', or knocks someone with a car, or sets a vicious dog on someone, or pushes a drunken man against another person who is thereby hurt, or pulls away a chair from under a person about to sit on it so that the person falls. If **A**, orders **B** to assault **C** and **B** executes the order, **A**, commits assault through the instrumentality of **B**. The crime may even be committed where **A** forces **B** by threats to injure himself as where, for example, he forces **B** to stab himself with a knife.

Indeed, most cases of battery include a psychic assault because there is a previous causing the victim to fear that unlawful force is about to be used against him, followed by the actual use of force against the victim. When **A** raises his hand in front of **B** to hit him, he thereby causes **B** to fear that he will be hit. Causing that fear of violence is a psychic assault. When **A** brings down his hand on **B** and actually delivers the blow, that is battery. A psychic assault always precedes a battery. However, a psychic assault presupposes that the victim sees or is aware that he is about to be hit. This means that in some cases a battery may be committed without there having been a psychic assault, as where a man hits another who is blind, is asleep or is taken completely unaware.

Classification of non-fatal assaults under the Penal Code. The Penal Code classifies non-fatal assaults into types, depending on whether any injury was caused, and if caused, the seriousness of the injury. Six categories of non-fatal assaults are identifiable: simple threats, conditional threats, minor assaults, assaults occasioning slight harm, assaults occasioning simple harm, and assault occasioning grievous harm.

The first two types (simple threat, conditional threat) are cases of psychic assault. The victim suffers no injury, and what is punished is the use of threat for certain unlawful ends. The other types are cases of physical assault (battery). The gravity of the hurt received as a result of the application of the unlawful force is measured by the number of days of illness or incapacity for work occasioned by the physical assault. In 'grievous harm' what makes the harm 'grievous' is the rather extensive nature of the injury inflicted on the victim (maiming or mayhem). The instruments or the means used in inflicting

such injuries are reckoned as circumstances warranting the imposition of a higher penalty.

The basis for penalizing assault is the inviolability of the human being. Assault is not made a crime because of the means used in perpetrating it or even because of the extent of the injury inflicted on the victim (though these matters of course affect punishment). The law proscribes any unlawful assault. Every person's being is sacred and no other person has the right to meddle with it in any slightest way. This means the law of assault applies, and should be enforced by the police, even in the family setting; so that a spouse can be convicted of assaulting the other spouse or a parent of assaulting his/her child or a child of assaulting his/her parent. This being the case it would seem redundant to enact a separate legislation focusing only on this specific aspect of domestic violence or of child abuse.

§2. Threats

Threats are assaults in which physical bodily harm is not an element. They are in fact cases of psychic assault. It is an offence to threaten by gesture, word or cry, whether uttered in public or in private, certain public officials or certain public bodies.⁵⁹⁴ The Code punishes as guilty of 'contempt' anyone who threatens, for example, the President, a public body or public administration, a public servant, or a witness.⁵⁹⁵ It is an offence under section 161(1), punished as 'procuring influence', to corrupt a person by threat. Using threat to obstruct a minister of religion in the exercise of his ministry is also an offence under section 271.

There are two sections in the Code that deal with threats in general. Section 301 punishes what it calls 'simple threats' while section 302 punishes what it terms 'conditional threats'. Both are among offences relating to personal tranquility.

Simple threats. By section 301, whoever by any writing or picture threatens another with force or interference, or with the destruction of any property, or with breaking into his residence, is punishable by imprisonment for from 10 days to 3 years and with fine⁵⁹⁶. The offence is consummated by the mere threat against another person to harm him or to break into his residence or to destroy *any* property. Actual harm, break-in or destruction is not required. It is sufficient that the victim was put in fear of being hurt, or of his residence being broken into, or of any property being destroyed, as the case may be. The section does not require that there should be apprehension of *immediate* force. But the requirement of immediacy must be read into the section if the offence

⁵⁹⁴ See, sections 152-155.

⁵⁹⁵ See, sections 153, 154 and 197.

⁵⁹⁶ From 5 000 to 150 000 francs.

is not to be rendered meaningless.

Section 301 requires that the threat should be by any writing or picture. This requirement excludes verbal threats and menacing gestures such as laying hands on a weapon or shaking a clenched fist at another or pointing a finger at another in an angry vengeful, rude or insolent manner, inspiring belief that force is to be applied. Section 301 is in this respect narrower than psychic assault under English common law.

Conditional threats. Section 302(1) enacts: “Whoever threatens another, expressly or by implication, with force or other interference in case of his failure to comply with any order or condition shall be punished with imprisonment for from ten days to six months and with fine⁵⁹⁷.”

The offence is restricted to threats of application of force against the person of another. But it is immaterial how the threat is conveyed: expressly or by implication, verbally or in writing, by gesture or otherwise. The threatener must have issued some order or condition exacting compliance from the person threatened. The order or condition may be one to do or not to something. “Stop screaming or I’ll silence you” is as much a conditional threat as “Your money or your life.”

In *Tita Gabriel Akum v The People* (2007)⁵⁹⁸ the appellant, armed with a Dane gun, threatened to kill V if V ever entered again upon a piece of land in dispute. Another case in which the threat was to kill if V again entered upon a disputed piece of land is that of *Nkweni Neba Ngwa & Numfor Donatus Nkweni v The People* (2005)⁵⁹⁹. The facts of the case are as follows. One Assah has a piece of land at a place called Ntabang in Nkwen adjacent to the residence of 1st appellant, father of 2nd appellant. On the 30th November 2001 Assah took one Neba to view the plot with a view to selling same to Neba’s employer, one Ndikum. As Assah and Neba were inspecting the plot, 2nd appellant appeared with a stick and a cutlass and ordered the two men to leave, saying Assah had no right to sell the said plot again because his father, 1st appellant, had already bought it from him (Assah). As they argued, 1st appellant appeared armed with a stick and a cutlass as well and asked Assah what business he had on that plot. He then instructed his children who had come along with him to burn down the vehicle that had brought Assah and Neba. Assah and Neba left and later filed a formal complaint against the appellants and a three count charge was eventually preferred against them. Both were alleged to have disturbed the public peace when they, contrary to section 239, entered upon land quietly enjoyed by one Assah and, at the same time and place, “contrary to section 302(1)”, threatened to burn a vehicle brought to the land if the said Assah did

⁵⁹⁷ From 5 000 to 25 000 francs.

⁵⁹⁸ Appeal No. BCA/MS/25c/2005, unreported.

⁵⁹⁹ Appeal No. BCA/MS/6c/2004, unreported.

not leave. Nkwenti Neba Ngwa was alone charged on the third count with threatening, “contrary to section 302(2)(a)”, to kill the said Assah if he again entered the piece of land in question. The defence of 1st Appellant was that the piece of land in question was his and that he was unaware that that Assah had planted pillars to demarcate the same piece of land and even had a land certificate over it. He denied he ordered his children to burn down the vehicle Assah and Neba had used to get to the disputed piece of land. The 2nd appellant claimed the 1st appellant and Assah had had a dispute over a piece of land which was finally settled. He denied threatening to burn down any vehicle. Appellants were found guilty on the first count (disturbance of quiet enjoyment of land) but not guilty on the other counts. On appeal, Held by the Court of Appeal (Njilele, Tume, Njumbe, JJA, Vice Presidents) dismissing the appeal, that Assah had a land certificate over the piece of land in question and was entitled to possession and enjoyment of it; that Appellants’ intrusion onto the land was intentional since they had not been invited and since the intention they had harboured was to stop the transaction Assah had in mind to carry out.

In *Niba Samuel & 2 Ors v The People & Anor* (2008)⁶⁰⁰, appellants went to X’s land situate at Ntiefor, Bafut, which he inherited from his late father and destroyed boundary marks and a farmhouse, cut down bamboos and threatened to kill X. Appellants’ defence was that they, and not X, owned the piece of land in question. They were convicted of threatening another’s life (s. 302(2)(a)), destruction of property (s. 316(2)) and destruction of boundary marks (s. 317(a)). On appeal (Mbeng, Mboh, Mbaki, JJA, Vice Presidents), held, that the judgment of the trial court must be confirmed. In delivering the decision of the Court Mbaki J reasoned along Solomon’s line of wisdom that a person cannot claim ownership of property by destroying it and that the mere fact that appellants carried out the destruction proved that the piece of land in question does not belong to them.

In terms of punishment, where the threatened force would constitute a felony punishable by death or by imprisonment for life, that fact is an aggravating circumstance entailing a higher punishment as follows: imprisonment for from 6 months to 3 years and a fine⁶⁰¹ where the threat was verbal⁶⁰²; and imprisonment for from 2 to 5 years and a fine⁶⁰³ if the threat was in writing or picture⁶⁰⁴. In this last case the court may also impose the forfeitures described in section 30.

⁶⁰⁰ Appeal No. BCA/MS/2c/2005, unreported.

⁶⁰¹ From 5 000 to 70 000 francs.

⁶⁰² Section 302(2)(a).

⁶⁰³ From 10 000 to 250 000 francs.

⁶⁰⁴ Section 302(2)(b).

§3. Harm: minor, simple, and slight

These three categories of bodily harm are collectively denoted in some jurisdictions as ‘common assaults’. Bodily harm means bodily injury or wounding. It means any hurt or injury calculated to interfere with the health or comfort of the victim. A person’s body consists of all parts of his body, including his organs, his nervous system and his brain. Bodily injury therefore may include injury to any of those parts of his body responsible for his mental and other faculties. It follows that the ‘rape of the lock’ of a lady does not constitute bodily injury to her.

Minor harm What section R. 370(1) describes as ‘act of violence of a minor nature’ is the category of non-fatal assaults of the lowest gravity, a trivial injury. By that section it is an offence punishable by imprisonment for from 5 to 10 days and/ or fine⁶⁰⁵ for anyone to perpetrate “any act of violence of a minor nature not resulting in an illness or an incapacity for work lasting more than eight days.” The phrase in quotes is a somewhat awkward linguistic formulation. It would appear to suggest that there is some kind of contrasting ‘violence of a minor nature’ resulting in illness or incapacity for work lasting more than eight days. It is submitted that the expression ‘violence of a minor nature’ is not used in any technical sense. It is further submitted that the provision simply means that an act of violence of a minor nature is any physical assault occasioning illness or incapacity for work lasting a maximum of eight days.

Where the assault occasioned no illness at all or no incapacity for work, it may or may not be punishable. It would be punishable if the assault were committed by carelessly throwing rubbish on the victim (section R. 367(10)) or by willfully throwing any hard object or rubbish on him (section R.370(1)). Where a physical assault is committed otherwise than by throwing rubbish or a hard object on the victim and the said assault does not result in any illness or in incapacity to work, it is not punishable. If **A** shoves **B** out of his way, or slaps him slightly, or nudges him aside, or lays his hand on his shoulder, or farts in his presence, or seizes his hand and presses it hard, or spits on him, or momentarily steps on his foot, **A** would have committed no assault offence because no illness or incapacity to work would thereby have been caused, though he could be held civilly liable in tort.

The law correctly considers cases such as these as mere trivial or technical assaults and, for policy considerations, does not penalize them. For one thing, only a momentary discomfort is caused. Besides, these forms of assault would seem to be everyday occurrence. To criminal and prosecute them would serve no real useful purpose and in fact would be a waste of the court’s time. This does not mean that the victim of a trivial assault is without a remedy. He is

⁶⁰⁵ From 4 000 to 25 000 francs.

entitled to sue the assaulter for damages in a civil court. Such damages that the court would be minded to award would at best be niggardly.

‘Simple harm’. This offence is committed when a person intentionally assaults another causing intentionally or unintentionally any sickness or inability to work lasting more than thirty days (s.280). The difference between this offence and that of ‘slight harm’ lies in the number of days of sickness or inability to work occasioned by the assault. The line is drawn at thirty days. Below that line the punishment is lighter; above the line it is heavier. This is reflected in the punishment prescribed for either offence. ‘Simple harm’, the more serious of the two offences, is punishable with imprisonment for from 6 months to 5 years and/or with a fine⁶⁰⁶.

Where the ‘simple harm’ is caused by lack of due skill, carelessness, rashness, or disregard of regulation the penalty is imprisonment for from 3 months to 5 years and/or fine⁶⁰⁷. If the ‘simple harm’ was caused in the course of driving a vehicle requiring a driving licence, the court may disqualify the offender for up to 3 years from holding such licence and for any subsequent offence may disqualify him for up to 10 years.⁶⁰⁸ The penalty is imprisonment for from 6 to 20 years where the ‘simple harm’ resulted from the commission of any of the following crimes⁶⁰⁹: arson⁶¹⁰, destruction⁶¹¹, rashly making use of fire etc⁶¹², or rashly demolishing any construction or uninhabited building⁶¹³.

In *Hodi Bi Shediki v. The People* (1973)⁶¹⁴ **X**, in the company of other persons, went in search of his missing cow. After a fruitless search and when it was approaching darkness they abandoned the exercise and all decided to go home taking different directions. **X** went on and passing through the vicinity of appellant’s home appellant met with him. Following a brief heated exchange of words both were engaged in a fight, which resulted in **X** receiving a serious stab wound at the back and he fell to the ground crying in pains. **A** and **B**, who were approaching the scene, heard the cry of someone in agony and hastened to the spot. But as they drew nearer they saw someone moving off and only his back could be seen. **A** and **B** arrived to find **X** severely wounded on the back bleeding profusely. They carried him off to the hospital with the assistance of other people after tying up the wound to control bleeding. A

⁶⁰⁶ From 5 000 to 200 000 francs.

⁶⁰⁷ From 10 000 to 500 000 francs. Section 289(1).

⁶⁰⁸ Section 289(4).

⁶⁰⁹ Section 289(2).

⁶¹⁰ Section 227(1).

⁶¹¹ Section 227(2).

⁶¹² Section 228(2)(a).

⁶¹³ Section 228(2)(b).

⁶¹⁴ (1971-73) UYLR 109. See also, *Bea Richard Andum v. The People* (1981), CASWP/20.c/81, unreported (premeditated stabbing).

complaint was later lodge with the Police, an investigation was mounted and the appellant was arrested and charged.

Upon conviction and sentence under section 280 the appellant appealed to the Bamenda Court of Appeal (Thomas, CJ, Inglis and Ekor' Tarh, JJA) on the ground, *inter alia*, that the learned trial Magistrate having found in his judgment that the defendant and **X** were involved in combat failed to consider the issue of self-defence and provocation. Held, dismissing the appeal and confirming the conviction and sentence, that the learned trial Magistrate arrived at a proper conclusion from the weight of evidence and that it was fitting not to disturb the findings of the lower court.

Delivering the unanimous judgment of the Court Inglis J said,

“If we hold that appellant was provoked by the complainant we consider that the force used by the appellant in retaliation was excessive and [disproportionate] in degree to the amount of provocation held out. A severe stab wound to the right back and lungs with severe internal bleeding which without sophisticated and skilled medical aid would have resulted in death within two to three hours was far out of proportion with a few strokes inflicted with a stave. ... We cannot give any consideration to the argument for self-defence because ... the location of the stab wound is material. If appellant inflicted the wound in self-defence, it should appear on the frontal portion or on the side of the victim. But being at the back and going to the lungs strongly suggests that it was inflicted when the victim turned to escape. In this regard it was the appellant chasing the victim who appeared to be running away from his assailant.”

Slight harm. This offence is committed when a person intentionally assaults another causing intentionally or unintentionally any sickness or inability to work lasting for any number of days between eight and thirty days (section 281).

In *Philip Fon Akong v. The People* (1973)⁶¹⁵ the complainant, **X**, went one evening to Independence Bar, Bamenda, in the company of her escort, **Y**. After a while **X** went outside the bar to attend to the call of nature, and **Y** followed her. After easing herself she remained conversing with some friends. The appellant came up to her. He held her and asked her for a loincloth which he had given her. He also asked her to refund to him 1 000 francs, being the cost of drinks he had bought for her. **Y** told appellant to leave **X** alone. Appellant did not but instead gave **X** a violent blow with his fist on her head. **X** sustained injuries to her left eye and was bleeding. She made a complaint to the Police and three days later she was taken to the hospital to be medically examined. A medical report was issued the same day. It read: “Gahymosis on the infra orbital region of left side with edenia and sulisderal hemorrhage on the left side of eye if not associated with any other complication. The lesion

⁶¹⁵ (1971-73) UYLR 161.

seems to be healed within ten days.”

Appellant was prosecuted and convicted for causing by force intentional sickness to **X** lasting more than eight days contrary to s. 281 and was sentenced to a fine of 100.000 francs or in default to a term of imprisonment for 9 months. Appellant appealed against his conviction and sentence. The Court agreed with the appellant that the sentence was excessive and illegal. The Court also agreed with appellant that the length of time it took for **X**’s injuries to heal was uncertain, there being no medical report on this particular point.

In her testimony **X** did say her injuries took three months to heal, but this assertion was not supported by medical evidence stating how long her injuries had actually taken to heal. The Court resolved the uncertainty in favour of the appellant by allowing that the period of illness was less than 8 days. Having found that the period of illness could have been less than eight days the Court held that the trial court should have convicted the appellant of a simple offence of the fourth class, i.e. under section R. 370 of the Penal Code. The Court accordingly substituted for the verdict found by the trial court a verdict of guilty of an offence under section R. 370 and passed a sentence of 20.000 francs fine or imprisonment for one month in default, in substitution for the sentence passed at the trial.

In *Haman Abanda Tabunla v. The People* (1973)⁶¹⁶ appellant stabbed **X** during a fight over the carcass of a cow belonging to appellant but that had allegedly been stolen by **X**. Appellant’s conviction under s. 281 for causing **X** sickness or inability to work lasting more than 8 days was quashed on appeal and a re-trial ordered because the Appeal Court was not satisfied that the appellant understood the effect of his guilty plea.

Slight harm is a less serious offence than simple harm. It is punishable by imprisonment for from 6 days to 2 years and/ or fine⁶¹⁷. Where the slight harm was caused unintentionally (i) by *a drunk or drugged driver of a vehicle*, or (ii) by *a driver without the requisite driving licence*, or (iii) by *a driver who with intent to evade his liability departs before being identified from the scene of an accident cause by him*, the penalty is imprisonment for from 6 months to 4 years and with fine⁶¹⁸. The court may in addition disqualify the driver from driving for up to 5 years, and, on subsequent conviction for life or for any lesser term.⁶¹⁹ Indubitably, slight harm caused under these circumstances is punishable very severely because driving while drunk or drugged, driving without a licence, and escaping from the scene of a motor accident are serious offences in themselves⁶²⁰ and are here considered as aggravating circumstances.

⁶¹⁶ (1971-73) UYLR 105.

⁶¹⁷ From 5 000 to 50 000 francs.

⁶¹⁸ From 10 000 to 100 000 francs. Section 290(3).

⁶¹⁹ Section 290(3).

⁶²⁰ Section 290(1).

General remarks. A number of points are worthy of note. First, it is no defence to a charge for ‘slight harm’ or ‘simple harm’ to plead mistake as to the victim. The doctrine of transferred intention applies. Section 284 provides that “for the purposes of sections 275 to 281 inclusive the infliction of death or the use of force or interference shall be treated as intentional notwithstanding that it is intended to be inflicted on or used against a different person.”

Secondly, the gravity of the hurt received by the victim is a medical and not a legal question. The determination of the number of days of sickness or inability to work occasioned by the assault is made by the physician and not the judge. In most instances the assessment is made hours or days well after the hurt has been received. The delay may worsen or lessen the hurt leading to the physician pronouncing more days or fewer days, as the case may be, of sickness or inability to work than he would probably have done had the victim seen him promptly. The difference in the number of days may be so appreciable as to remove the offence from a less serious category to a more serious one or vice versa. *Philip Fon Akong* illustrates this point. The question here is whether the court would be swayed by the argument that the victim contributed to the seriousness of the injury received by his delay in going to see a doctor soon after he was assaulted. It is doubtful that the court will buy this argument, though in a fit case the court may consider it as a mitigating factor.

Thirdly, what matters in these offences is the days of sickness or inability to work occasioned by the assault and not necessarily the kind of wound the victim may have received or the number of days it takes for the wound to completely heal, though of course the kind of wound inflicted certainly has a direct bearing on the question of sickness or inability to work. In the ordinary run of cases the assault would result in the wounding of the victim. A person is wounded when his skin is broken (the dermis as well as the epidermis). A scratch may be the result of an assault but it is not a wound. But the rupture of an internal membrane is a wound. An assault occasioning mental or psychological illness falls within the sections, just as an assault occasioning a wound or physical illness. The harm inflicted may be internal or external and need not be permanent, dangerous, or result in disablement or disfigurement (i.e. external injury which may detract from personal appearance such as slitting the nose or ear or finger).

Fourthly, the requirement of illness or incapacity to work makes the nature of the offence (whether serious or not) depend on the constitution of the victim, according as he is robust or weak in health, stout or delicate in build. This is consistent with legal principle. In law the aggressor or assaulter takes his victim as he finds him.

§4. Desertion of incapable

Where a person removes another who is unable to protect himself by reason of his physical or mental condition (e.g. an infant, a handicapped person, a senile person) with intent to abandon him, he commits an offence against section 282. The offence is known as ‘desertion of incapable’. ‘Desertion’ here is treated “as the use of force or as interference”.⁶²¹ In other words deserting an incapable is considered as the use of constructive force against the incapable. The offence is punishable by imprisonment for from 1 to 3 years and a small fine⁶²².

The lawmaker’s resort to constructive notion in the offence of ‘desertion of incapable’ is an exercise in overkill, an exercise in excessive thoroughness. ‘Desertion of incapable’ is the removal of any person unable to protect himself by reason of his physical or mental condition, with the specific intent of abandoning him. ‘Removal’ is an action verb and necessarily involves the use of force or interference, however slight. If there is no removal and only abandonment there is linguistically a desertion but there is no transgression of section 282. There is no transgression of the section first, because the word ‘desertion’ appears merely in the title of section 282 and is not an element of the offence under the section, and second, because there has to be a removal for the offence to be consummated. That removal constitutes an assault. In the law of assault the slightest touch suffices.

If the infirm thus removed and abandoned subsequently suffers injury, of whatever gravity, the person who removed and abandoned him can *additionally* be properly charged with the injury suffered by the infirm on the theory of causation and the well established principle that everyone must be taken to intend the natural consequences of his own acts. Let it be supposed that **A** removes **H** and abandons him at a lonely place where he dies as a result of attack by an animal or as a result of starvation or inclement weather. On principle, **A** can be charged with having committed two offences: ‘desertion of incapable contrary to section 282’, and, depending on **A**’s intention at the time, of ‘murder contrary to section 275’ or of ‘assault occasioning death contrary to section 278’. But the preferment of such a two-count charge might be thought oppressive. In practice, therefore, in a situation of this nature, only the latter, greater offence, is chargeable on the doctrine of ‘lesser and included offence’. The physical and mental elements required to be prove in order to secure a conviction under section 282 are included in the physical and mental elements required to be proved to secure a conviction under section 275 (intentional action by **A** and intentional causing by **A** of **H**’s death) or under section 278 (intentional force or interference by **A** and **A**’s unintentional causing of **H**’s death). Thus, even if the charge on the greater offence fails **A** can still be

⁶²¹ Section 285(b).

⁶²² From 5 000 to 25 000 francs.

convicted of the lesser offence of ‘desertion of incapable’ though not specifically charged.

An abandonment *in situ* (in its original place), as where **A** deserts a house thereby abandoning an infirm who is in the house is not enough though lexically the desertion is an abandonment. There must be a removal. Removal means to take from one place to another. Distance is immaterial. A removal from one room to another in the same house, or from one corner of a room to another, or from the house to a nearby bush or street just outside the house, is sufficient. But the removal must be accompanied by the intent to abandon the victim. The offence is not consummated if there is merely a removal without any intention to abandon. And whether the intention to abandon exists or not will depend on the circumstances of the case and may be inferred from the perpetrator’s conduct. If a person takes an infirm to the basement of his house and locks him there for days without nourishment he cannot be heard to say he did not intend to abandon him.

The place of abandonment following the removal and the special status of the offender are recognized aggravating factors. Thus abandonment in a lonely place is an aggravating factor that renders the accused liable to imprisonment for from 5 to 10 years (section 282(2)). Furthermore, where the offender is an ascendant or any other person having authority over the incapable or having custody of him, whether by law or in fact, the penalty is imprisonment for from 10 to 20 years (section 282(3)). Upon conviction the court may impose the forfeitures described in s.30 and may also deprive the offender of parental power for the same period (section 282(4)).

§5. Failure to render assistance to a person in danger

By section 283 a person is guilty of an offence and liable on conviction to imprisonment for from one month to 3 years and/ or a fine, if he “fails to render assistance to a person in danger of death or grievous harm, whether by his own endeavour or by calling for help, where such assistance involves no risk to himself or to any other person.”

The instances in which the law punishes mere abstention are rare. Some of these instances are discussed in chapters 3 and 6. The Good-Samaritan value captured in section 283 is another instance of punishable culpable abstention. In order to secure a conviction under the section the prosecution must show (1) that a person was in danger of death or grievous harm, (2) that the accused failed to render that person assistance, and (3) that rendering assistance involved no risk to the accused himself or to any other person. There is a legal duty to render assistance only where a person is at risk of grievous harm (that term being defined in section 277) or of death.

There is no legal obligation to render assistance to a person in danger of any other degree of personal injury, e.g. slight harm, minor harm, or simple

harm. The section talks of 'a person in danger of death or grievous harm. This means a person at risk of death or grievous harm. The source of the danger or risk is immaterial. It may be the action of the intervener, as where a motorist having knocked down a pedestrian fails to render assistance to him. The source of the danger may be an offence perpetrated by the victim himself or someone else, as where he is caught stealing and is given a snake's beating or a mob has gathered and is ready to lynch him. The source of the danger may even be the deliberate action of the victim himself, as where he jumps into a deep swimming pool knowing he cannot swim. The source of the danger may even be a life-threatening illness or occurrence such as grievous accident.

A person is at risk of death if he is in a situation where he might die or be killed. A person may be trapped in a motor vehicle involved in a road accident. He may be in a house on fire or he may be buried in the rubble of a collapsed building. He may have been driven into a corner by a wild animal and he is apparently unable to escape. An animal may have savagely attacked him or thieves or his foes may have murderously set upon him. He may be exposed to extreme weather, unable to help himself. He may be in water, unable to swim and is drowning. He may have fallen into a deep pit, unable to climb out. He may be afflicted by an acute life-threatening condition. He may be starved to the point of near death. In all these instances the person is at risk of death and there is a legal duty imposed by section 283, under pain of punishment, to render assistance to such person.

But a person is at risk of grievous harm when such harm is merely apprehended, as when a person is pursuing another with a machete in hand. The duty of the third party intervener is then to render assistance so that the grievous harm is not inflicted. When the harm has already been inflicted the only possible risk is that of death, which of course invites the rendering of assistance.

The obligation imposed under the section is an obligation of means, not of result. The obligation is only to render assistance, not effective assistance, albeit that it is reasonably expected that the assistance would be effective. Provided the accused rendered assistance, he cannot be convicted if the person in danger nevertheless dies or suffers grievous harm. This is the more so as the sort of assistance required need not be the intervener's own endeavours. The intervener, even if he can assist by his own endeavours, could decide to assist by calling for help. The intervener would have discharged his obligation to assist under section 283 if he merely called for help, e.g., by alerting the police, the fire brigade, neighbours and so on.

The intervener must of course be in a position to render assistance by his own endeavours or by calling for help, which would not be the case if he suffers from some disability that makes it impossible for him to render any such assistance. Further, a person is legally required to render assistance only

“where such assistance involves no risk to himself or to any other person.” The law does not encourage a show of boldness intended to impress. If rendering assistance by his own endeavours would involve risk (of whatever nature) to himself or to any other person, then there is no obligation to do so. Similarly if rendering assistance by calling for help would involve risk (of whatever nature) to himself or to any other person, then he is released from the duty to do so. But the risk pleaded to justify escape from the obligation to render assistance must, on principle, be of some degree of seriousness.

It is difficult to rationalize the Code’s classification of the section 283-offence under the title ‘intentional force and interference’. Failure to assist, of course, amounts to an offence only where the abstention is intentional. In other words the failure to act is punishable only if it is deliberate. But the ‘failure to assist’ cannot, by any stretch of the imagination, be said to constitute ‘force’ or ‘interference’. The term ‘desertion’ under section 282 is, by s. 285, constructively treated as the use of force or as interference. The Code assigns no such constructive meaning to the expression ‘failure to render assistance’ under section 283. The conduct is not an assault; it is not a battery.

The crime of ‘non-intervention’ under section 171 is not to be confused with ‘failure to render assistance’ under section 283. The former is an offence against the administration of justice. It punishes anyone who “refrains from preventing the commission of any felony or of a misdemeanour.” The offence in effect makes everyone, who can do so without risk, generally responsible for crime prevention. Section 283 on the other hand is a Good Samaritan provision. It invites everyone who can do so without risk to show compassion to any ‘neighbour’ at risk by coming to his help.

The Biblical story of the Good Samaritan is recounted in Luke 10:25-37:

“Then an expert on the law stood up to test Jesus, saying ... ‘And who is my neighbour?’ Jesus answered, ‘As a man was going down from Jerusalem to Jericho, some robbers attacked him. They tore off his clothes, beat him and left him lying there, almost dead. It happened that a Jewish priest was going down that road. When he saw the man, he walked on by the other side. Next, a Levite came there, and after he went over and looked at the man, he walked by on the other side of the road. Then a Samaritan traveling down the road came where the hurt man was. When he saw the man, he felt very sorry for him. The Samaritan went to him, poured olive oil and wine on his wounds, and bandaged them. Then he put the hurt man on his own donkey and took him to an inn where he cared for him. The next day, the Samaritan brought out two coins, gave them to the innkeeper, and said, ‘Take care of this man. If you spend more money on him, I will pay it back to you when I come again.’” Then Jesus said, ‘Which one of these three men do you think was a neighbour to the man who was attacked by the robbers?’ The expert on the law answered, ‘The one who showed him mercy.’ Jesus said to him, ‘Then go and do what he did.’”

This Biblical injunction to assist one's neighbour in distress is a religious duty. But section 283 sublimates this Christian moral value into a legal obligation backed by sanction in the event of its breach.

§6. Grievous harm

This is the gravest non-fatal assault that can be caused. The essence of the offence is permanent dismembering or disabling of another. The offence generally covers such grave hurt as serious permanent injury to eye, nose, ear, limb, or dismembering of the male genitalia (sometimes called malicious castration, or 'Bobbitt'). In some jurisdictions the offence still goes by the archaic term 'mayhem' or 'maiming'.

Historical. In English law mayhem or maiming was, historically, a bodily hurt whereby a man was rendered less able in fighting to defend himself or to annoy his adversary. Cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or tooth, or depriving him of those parts, the loss of which in all animals, abates their courage, were held to be maims. But, curiously enough, cutting off of a man's ear, or nose, or the like, was not held to be maims on the strange reasoning that it did not weaken a man but only disfigured him.

At common law a person who maimed himself in order to have a more specious pretence for asking charity or to prevent his being impressed as a sailor or enlisted as a soldier was guilty of a crime. Maiming oneself or the victim's consent to be maimed was frowned upon because preserving the king's army was the rationale of the offence. A man who maimed another thereby rendered him less able to fight for the king and country as well as the man who maimed himself or consented to his own maiming to avoid enlistment were both guilty as perpetrators inasmuch as both contributed to the diminution of the king's fighting force. Where mayhem, or the maiming of a person, was committed, the judgment was *membrum pro membro* (member for member; a reminder of the *lex tallionis* of antiquity or the 'tooth for tooth' principle in Mosaic law). But this judgment afterwards went out of use, partly because the law of retaliation is at best an inadequate rule of punishment.⁶²³

Definition of 'grievous harm'. A person commits grievous harm within the meaning of s.277 where he "permanently deprives another of the use of the whole or of any part of any member, organ or sense." It is thus an offence to disfigure or to disable a person. There need be no danger to life or health or even serious interference with comfort, though this would usually be the case. What matters is the type and degree of the resulting harm. 'Grievous' means 'serious', 'more than trifling'.

⁶²³ *Russell on Crime*, pp. 626-629.

The law presumes any disfigurement or disablement to be serious whether or not it presents any danger to life or health or interferes with comfort. Suppose that **A** slits the lobe of **B**'s ear (or bites it off *à la* Mike Tyson) or chops off **B**'s little finger or knocks off **B**'s tooth, **B** would have been permanently deprived of a part of a member. But none of these injuries would present any danger to **B**'s life or even interfere with his general health and such pain as he will feel would be only transitory.

In *The People v. Che Martin* (1976)⁶²⁴ the victim, Esther Ngu, tried to act the Good Samaritan but she was attacked and permanently deprived of a tooth. She was returning from Bambili market when she saw a boy being assaulted by two assailants. The defendant was one of them. She ran to the scene and tried to rescue the boy. The defendant turned round and assaulted her. He hit her on the mouth. The blow was so vicious that one of her teeth fell off and blood began to ooze out. She picked up the knocked-off tooth. The following day she made a report to the Gendarmerie. She also went to the hospital for a medical examination and report.

The defendant was arrested and charged with permanently depriving the prosecutrix of her tooth. He denied ever assaulting the prosecutrix and causing her grievous harm by knocking off her tooth. He called a sole witness who confirmed his short defence. The witness was in fact his friend who was involved with him in assaulting the boy when the prosecutrix went to intervene. The court found collusion between the defendant and his sole witness in the line of defence that was taken.

Moreover, the medical report clearly indicated that the prosecutrix lost her left lower canine which was completely and traumatically exfoliated, and that the exfoliation was so recent that the surrounding tissues were inflamed and the victim was in great pains. From the totality of the evidence before it, and in the absence of any evidence that the tooth was earlier diseased or that it was unsound to fall off at the slightest knock, Ekor' Tarh, J sitting at the Mezam High Court had no difficulty in holding that the prosecutrix was permanently deprived of the use of her tooth which is part of her body or organ of the mouth. The defendant was found guilty as charged and, taking into account his youthfulness and the fact that he was a first offender, was sentenced, most leniently, to a fine of 50 000 francs or 18 months imprisonment, and ordered to compensate the prosecutrix with 30 000 francs for the loss of her tooth.

Mistake as to the victim on whom the injury was inflicted is no defence (s.284). In other words the doctrine of transferred intention applies. If **A** intends to assault **B** but mistakenly assaults **C**, his intention is by virtue of section 284 transferred from the intended victim to the actual victim. The logic of the law is that he intended to assault a human being and did assault a human being, and that the identity of the victim is a particular that is of little

⁶²⁴ Criminal Suit No. HCB/8.c/76, unreported.

consequence because the law of assault is concerned with the protection of the bodily integrity of *every* human being.

Factors affecting punishment. Where the assault and the resulting harm were both intended the penalty for ‘grievous harm’ is imprisonment for from 10 to 20 years (section 277). If the assault alone was intended while the resultant grievous harm was unintended the punishment is imprisonment for from 5 to 10 years.³⁰

The penalty is much higher where certain specified means or methods are used to commit the assault resulting in grievous harm. Thus ‘grievous harm’ becomes punishable by imprisonment for from 6 to 15 years where it is committed by means of: a weapon⁶²⁵, an explosive substance, a corrosive substance, a toxic substance, an act of magic, an act of witchcraft, or an act of divination (section 279 (2)).

The penalty is even higher (6 to 20 years imprisonment) where the grievous harm resulted from the commission of any of the following offences: ‘arson’ or ‘destruction’ under s.227, or ‘dangerous activities’ under section 228.

The penalty for causing grievous harm is however substantially reduced (imprisonment for from 3 months to 5 years and/or a fine⁶²⁶) where the perpetrator acted without due skill, or carelessly, or rashly, or in disregard of regulations (section 289(1)). The reason for the reduced penalty appears to be that carelessness or rashness is a less blameworthy state of mind than intention or negligence. It is noteworthy that where any offence against section 289 (‘unintentional killing and harm’) is committed in the course of driving a vehicle that requires a driving licence, the court may disqualify the offender for up to 3 years from holding such licence, and, for any subsequent offence may disqualify him for up to 10 years (section 289(4)).

§7. Deliberate communication of HIV

There is currently no law in the statute book of this country that specifically criminalises the conscious transmission of HIV. There appears to be a general disinclination, on policy grounds, to create such an offence. It is feared that such an offence would dramatically increase the stigmatization and discrimination of persons living with either HIV or AIDS, would induce a greater reluctance on their part to disclosure of their status, and, overall, would seriously compromise the ‘war against HIV and AIDS’.

At the same time, however, it seems clear that there is need to visit the rigour of the criminal law on those who either through sex or other means deliberately infect others with HIV. In the USA, an Illinois Statute of 1989 was passed precisely to do just that. In terms of that Statute, if a person knows

⁶²⁵ The term is defined in section 117.

⁶²⁶ From 10 000 to 500 000 francs.

he/she is HIV-positive and engages in unprotected sex with another and infects that person with the virus he commits an offence and is liable to prosecution and punishment. That piece of legislation was unsuccessfully challenged in the case of *The People of the State of Illinois v. Russell*.⁶²⁷ In England, the Crown Prosecutor uses grievous bodily harm offences, the Public Health (Control of Diseases) Act 1984 and the Regulation of 1988 to prosecute persons who deliberately infect others with infectious diseases, including the HIV virus.

On 13 October 2008 an Internet news item reported the case of one Simon Mol, a Cameroun citizen resident in Poland since 1999, arrested by the Warsaw police in January 2007 following complaints of infecting over 40 women with HIV. In July 2007 the public prosecutor filed thirteen charges against him, eleven counts alleging intentional HIV infection, one alleging exposure of women to HIV, and one alleging “possession of cold weapon” (the Internet report did not say what this meant) without a permit. The accused’s defence was simply that he was unaware of his HIV-positive status. Within a year the medical condition of the accused had so deteriorated that in September 2008 he was moved from prison to a Warsaw hospital where he refused to undergo any form of treatment and died a month later. The criminal action brought against him was consequently abated.

In jurisdictions in which there is no specific HIV-infection offence, prosecutors have, depending on the circumstances, ingeniously prayed in aid a variety of general crimes: rape, assault causing grievous bodily harm, murder, or administration of poison. Where a person who knows he is HIV-positive rapes and in consequence infects the victim the courts would readily take the infection of the rape victim as an aggravating circumstance of the rape committed. The courts would do likewise where a person assaults another with a needle or blade that is stained with HIV infected blood. There is also the option of the victim suing in tort and claiming damages for negligence.

In the old English case of *R. v. Clarence*⁶²⁸, a person of that name was convicted of an assault upon his wife occasioning ‘actual bodily harm’ and of unlawfully and maliciously inflicting upon her ‘grievous bodily harm’. Clarence who knew he was suffering from a form of gonorrhoea nevertheless had marital intercourse with his wife without informing her of this fact. He infected her and the lower court held that this amounted to infliction of grievous bodily harm. He however successfully appealed against his conviction.

Of the thirteen judges that considered the appeal, nine quashed the conviction and four dissented. According to the majority opinion, for a man to infect his wife with a venereal disease constitutes neither an assault nor the

⁶²⁷ 630 NE Rd 794 (111, 1994).

⁶²⁸ 1888) 22 Q.B.D. 23.

infliction of grievous bodily harm, even though he knew of his condition and she did not, and even though she would not have allowed sexual intercourse had she known of it. The majority opinion further held that fraud vitiates consent to intercourse only if it is as to the nature of the act itself or as to the identity of the person who does the act.

Stephen J expressed the majority opinion this way:

“Is there an ‘infliction of bodily harm either with or without any weapon or instrument?’ I think there is not for the following reasons. The words appear to me to mean the direct causing of some grievous injury to the body itself with a weapon, as by a cut with a knife, or without a weapon, as by a blow with the fist, or by pushing a person down. ... Infection by the application of ... poison appears to me to be of a different character from an assault ... [because of] the uncertain and delayed operation of the [poison] by which infection is communicated. If a man by the grasp of the hand infects another with smallpox, it is impossible to trace out in detail the connection between the act and the disease, and it would, I think, be an unnatural use of language to say that a man by such an act ‘inflicted’ smallpox on another. ... Is the case then ‘an assault occasioning bodily harm?’ The question here is whether there is an assault. It is said there is none, because the woman consented, and to this it is replied that fraud vitiates consent, and that the prisoner’s silence was a fraud. Apart altogether from this question, I think that the act of infection is not an assault at all, for the reasons already given. Infection is a kind of poisoning, and poisoning, as already shown, is not an assault. Apart, however from this, is the man’s concealment of the fact that he was infected such a fraud as vitiated the wife’s consent to the exercise of his marital rights, and converted the act of connection into an assault? It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second woman being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance promises not intended to be fulfilled. ... The woman’s consent here was as full and conscious as consent could be. It was not obtained by fraud either as to the nature of the act or as to the identity of the agent. The injury done was done by a suppression of the truth. It appears to me to be an abuse of language to describe such an act as an assault.”

Referring to the point made by Stephen J about rape, Hawkins J argued in his dissenting opinion that:

“Rape consists in a man having sexual intercourse with a woman without her consent, and the marital privilege being equivalent to consent given once and for all at the time of marriage, it follows that the mere act of sexual union is lawful, but there is a wide difference between a simple act of communion which is lawful, and an act of communion combined with infectious contagion endangering health and causing harm, which is unlawful.”

With due respect, it is submitted that *Clarence* was wrongly decided on the issue of consent. Clarence’s wife consented to normal marital sex and not to being infected with a disease and the resultant harm. Three peculiar factors appeared to have influenced the decision in that case: the technicalities of the particular wording of the offences under which the charge was brought, the question of marital privilege (conjugal rights), and the fact that it would seem that in the nineteenth century it was lawful for one to consent to the infliction upon himself of bodily harm not amounting to a maim. Today, however, none of these three considerations remains. Moreover, *Clarence* was also peculiarly decided the way it was because the accused was charged with assault (defined as the *infliction* of bodily harm) and the court took a narrow view of the word ‘inflict’. It is probably the case that the result would have been different had the charge been one of ‘infecting’ the other party.

It may thus be stated without fear of contradiction that when there is an infection with a sexually transmitted disease it does not matter that the infection arises out of an activity to which the victim consents, for the simple reason that the victim would not have consented had he/she known. Where the defendant pleads consent as a defence the consent, to be valid, must correspond to the harm which accrued. There is no credible basis for assuming that by consenting to sexual intercourse one *ipso facto* consents to the risk of contracting a sexually transmissible disease or to be inflicted with any other sex-related harm. If one takes the example of sports, the law is clear that consent to the risk of some injury occurring during the game negatives assault only when the injury arises accidentally or negligently out of *bona fide* playing of the game according to the rules; the consent does not extend to the deliberate and unlawful infliction of harm. The same distinction ought to apply in the case of sexual intercourse. A serious sexually transmitted disease is actual bodily harm, for it is a physical invasion.

In the leading case of *R. v. Cuerrier*⁶²⁹, the Supreme Court of Canada upheld the conviction of a person living with HIV, who engaged in unprotected sex with the complainants without disclosing his HIV-positive status.

The Court held that nondisclosure of HIV status constituted fraud on the part of the accused and vitiated consent to sex given by the complainants. The

⁶²⁹ (1998) 2 SCR 371.

fraud, said the Court, was of a sufficiently serious nature as to invalidate consent. At the time of the trial, the complainants tested negative for HIV. This fact was immaterial as far as the criminal liability of the accused was concerned. In the view of the Court it was sufficient that the accused had exposed the complainants to a significant risk of serious bodily harm and was therefore guilty of assault under the Canadian Criminal Code.

In the American case of *Magic Johnson v. Doe*⁶³⁰ an HIV-positive Michigan woman claimed she had acquired HIV from Magic Johnson, the famous American basketball player, during a one night stand some years earlier. The court held that in order for Johnson to be held liable, proof would be required that Johnson knew or should have known at the time of sexual encounter that he was infected with HIV. Since there was no proof that he had this knowledge, he owed her no duty.

What may be extracted from *Cuerrier* and *Magic Johnson* is that there is a duty on a HIV-positive person to disclose his/her status to the other party with whom he/she seeks to engage in unprotected sex. However, two issues remain unsettled. Is there anything like a duty of utmost good faith in sexual relationship, and if not, ought, as a matter of law, the status of *uberrima fides* be granted to lovers' relationship, which is a relationship in which lies and deceit are commonplace? Is there still any duty of disclosure on a HIV-positive person who takes reasonable measures to protect the partner through use of condoms so that the risk of transmission of the HIV virus is significantly reduced?

Abroad, it would seem the general offence of assault causing grievous bodily harm comes in quite handy in prosecuting cases of conscious infection with HIV. In this country it is doubtful to the extreme that any of the assault offences in the Penal Code could be successfully used to prosecute persons who deliberately infect others with the HIV virus.

First, the common assault offences in the Code (i.e. minor harm, simple harm, slight harm) are so trivial in nature and punishment compared with the gravity of HIV infection, that their use must be discounted as grossly inadequate. Secondly, for technical reasons neither the crime of 'assault occasioning death' (section 278(1)) nor that of 'unintentional killing' (section 289(1)) would secure a conviction for deliberate HIV infection because it is unlikely that the victim would have died at the time of the prosecution, and even where the victim would have died the prosecution would most likely have an uphill task establishing the causal connection between the alleged HIV infection by the defendant and the death of the victim.

Thirdly, it might be thought that the offences to have recourse to are 'grievous harm' (section 277) and 'assault occasioning grievous harm' (section 279(1)). But the offence of grievous harm is defined as "permanently

⁶³⁰ 817 F. Supp. 1382.

depriv[ing] another of the use of the whole or of any part of any member, organ or sense.” The definition clearly does not cover the case of HIV infection. The crime of ‘assault occasioning grievous harm’ is committed when a person intentionally uses force or interference and unintentionally causes to another the permanent deprivation of the whole or of any part of that person’s member, organ or sense. In the case of HIV infection both the force/interference and the transmission of the HIV virus are intentional, which is not the sort of situation contemplated by section 279 (1). Furthermore, the section refers to the deprivation, in whole or in part, of any member, organ or sense; which is not what happens when a person is infected with the HIV virus.

§8. Justification of the use of force

An assault constitutes an offence only if it is unlawful. And it is unlawful only if it is not authorized or justified or excused by law or consented to by the person assaulted within such limits as the law allows. Indeed, there are many situations in which the law permits a person to inflict hurt upon another without incurring any criminal liability. But any hurt is unlawful if it goes beyond that to which the consent of the injured party has been given and the law has assented, or, in the case of domestic chastisement or official discipline (where these are permissible), is inflicted beyond reasonable measure. If the victim refuses consent to what is done, an offence against the person will be committed, unless some lawful excuse is available.

Force lawfully applied with the victim’s consent. As a general rule the use of force against the person of another is not unlawful when he has consented to it. The law presumes that persons who go about in public consent to the degree of contact that is an inevitable incidence of everyday life, for example, bodily contact with others in a street, shop, bus, train, airplane, bar, cinema, theatre, sports field and other public places or places open to the public.

Consent expressly given usually negatives an offence of assault. The consent, however, must be one given freely by a rational and sober person. Submission by a child in the hands of an older and stronger person and possibly acting under fear or a sense of constraining authority is not equivalent to consent. Similarly, consent by a person of weak intellect who is incapable of understanding the nature of the act to be done, is ineffective. Consent obtained by the use of threats or intimidation is not valid consent. Fraud vitiates consent and so a consent obtained by fraud or violence is not valid consent. However, the fraud must relate to the nature and quality of the act to be done, or to the identity of the person doing the act or to some other important matter. Consent to an assault is also ineffective if the assault is of a nature likely to endanger human life or if it is for the doing of any act which is

in itself against the law.

There are three cases where a person may consent to acts of assault being committed on him: a properly conducted game of sports, reasonable surgical interference for medical treatment, aesthetic treatment. Apart from these recognized cases, it is not in the public interest that people should try to cause, or should cause, each other injury for no good reason.⁶³¹

In *R. v. Brown*⁶³² the accused belonged to a group of sado-masochistic homosexuals who willingly participated in acts of violence against each other, including genital torture, for sexual pleasure engendered in the giving and receiving of pain. The passive partner in each case consented to what was done and bodily harm suffered was not permanent. The activities took place in private. The police discovered the activities by chance. The accused were convicted of assault occasioning injury and unlawful wounding. The defence was that the acts were carried out in private with the victims' consent. The House of Lords held that since injury was intended and caused, consent was irrelevant, unless it could find that it was in the public interest to permit such activities by recognizing as valid a consent to intentional causing of actual bodily harm in the cause of sado-masochistic practices, and there were several good reasons why it should not do so, among which was the risk of spreading disease such as AIDS.

(i) Sports

Consent may be given to acts done in the regular course of a lawful game such as soccer, athletics, rugby, wrestling, judo, karate, boxing, basketball, handball, American football etc. which, apart from consent, would be assault. So if a person hurts another in the regular course of a lawful game it is not an assault, first because his intent was lawful, and second because sports are commendable in promoting courage and activity, recreation, peace and national pride. They are manly diversions. They are intended to give strength, skill and activity, and may fit people for defence, public as well as personal, in time of need. The rule in respect of properly conducted game or sport does not extend to protect a person who gives blows in a fight by consent, nor to a fist-fight by two men 'settling a score', nor where the force used is such as to involve a breach of the public peace and to affect the public as well as the person struck. The consent given in a game or sport where the participants consent to intentional injury is consent only to intentional harm *within the rules*. The boxer, for example, does not consent to a blow below the belt or to a blow delivered between rounds.

In sports, disregard of the rules of the game might thus afford evidence of hostile intent or recklessness, or that the act done was not of the class of acts

⁶³¹ *Attorney General's Reference (No. 6 of 1980)* [1981] 2 All E.R. 1057.

⁶³² [1993] 2 All E.R. 75.

consented to by the person struck. But where in any lawful sports activity the rules of the game are followed but a party is nevertheless hurt, the assault is not an offence. Accordingly, in such a case, and by virtue of s.288 no charge would lie for assault occasioning death, grievous harm, simple harm or slight harm. In terms of that section an act “done in the course of a sport *and in accordance with its rules*” does not amount to an *actus reus* of any of the offences therein.

Sports are certainly not altogether free from danger. Now and again there is an occasional hurt (except in conventional boxing, kick boxing, Thai boxing, and full contact karate where hurt appears to be the main purpose of the sport). But they are very rarely attended with fatal consequences. In any event each party has friendly warning to be on his guard. Proper caution and fair play must be observed and excessive force avoided. The referee or umpire is there to ensure adherence to the rules of the game and to penalize defaulters.

(ii) Medical treatment

Consent to medical treatment frees the person giving the medical treatment from criminal responsibility for assault, provided that the consent was freely given with knowledge of the purpose of the treatment, that the purpose of the treatment was lawful, and that the treatment was given with professional skill and by a person duly authorized to render them (section 286). If an adult patient who is not mentally incapacitated freely refuses to consent to medical treatment, a doctor will be guilty of an offence against the person if he performs the treatment on the patient, however irrational or dangerous the refusal is.

Medical treatment for merely scientific experiment (i.e., the use of human guinea-pigs) is unlawful even if the person consented to it; for, to hold otherwise would be to suggest that it is lawful for a person to consent to being maimed or killed for the purpose of carrying out some scientific experiment. A treatment which consists in aborting a woman quick with child is equally unlawful unless it be shown that it was rendered in order to preserve the mother’s life (section 339(1)) or that the pregnancy resulted from rape (section 339(2)).

Whether male and female circumcisions are reasonable surgical operations for cosmetic or therapeutic reasons is an open question. But these, like cases of scarification and of flagellation sessions, are practiced by many communities either as religious or tribal ritual, or as merely a matter of custom, and are thus not penalized. But a mutilation of the body in order to secure a discharge from the military and sex-change operations raise different considerations. However, sterilization and cosmetic surgery appear to be reasonable surgical operations and may thus be consented to. In the English civil case of *Bravery v. Bravery*⁶³³,

⁶³³ [1954] 3 All E.R. 59.

Lord Denning held that a sterilization operation performed on a man for non-eugenic reasons (to enable him to enjoy sexual intercourse without the risk of becoming a father) would be unlawful as being injurious to the public interest. But other Lords Justices in the case were not prepared to hold that such operations were injurious to the public interest. And in the view of a learned author, "There can be no doubt that a sterilization operation for such a purpose would now be held to be reasonable surgical interference, as would a cosmetic operation, so that a valid consent could be given to them."⁶³⁴

To give treatment with professional skill means to use such skill as the person giving the treatment professes and with all the care that he can take in an honest endeavour to help a sufferer. Under such conditions any hurt that his ministrations occasion will not amount to an *actus reus*. It is submitted that an authorized person for the purpose of medical treatment is any person who belongs to the medical profession (surgeon, physician, dentist, clinical associate, nurse, pharmacist, mid-wife, etc.) as well as any 'traditional doctor' recognized and licensed by the association of traditional doctors and any 'traditional mid-wife' in the village.

The consent to medical treatment need not be that of the patient. Normally, if the patient is an adult and can appreciate the nature and quality of the treatment to be given to him, it is his consent that will be sought. But if the patient, though an adult, is in such a state or condition as to be incapable of consenting or dissenting, or if he is a child, his spouse or person having custody of him, as the case may be, may give consent on his behalf; and where communication with the said spouse or person having custody is impossible without risk to the patient, consent may be dispensed with (section 286).

By section 287 the infliction of harm and the use of force do not constitute an offence where proved to be justified by the immediate necessity of avoiding greater harm to the victim. There is no requirement under this section that the victim should have consented. Hence, a surgeon incurs no criminal responsibility where, with proper care and skill, and for the physical benefit of a sick person, performs a surgical operation on the patient without the patient's consent. This is a special necessity defence authorizing the infliction of hurt on the victim in order to prevent a greater hurt to him. The need to avoid greater harm to the victim must be 'immediate' and 'necessary'. It must be shown that it was urgent to inflict the harm and it was necessary to do so in order to avoid a greater harm to the victim.

Clearly the harm inflicted must be less serious than the anticipated harm sought to be avoided. This involves a balancing of harms. Where life is at stake this will present no problem, as physical death (in contradistinction to spiritual death) is the greatest harm that a man can suffer. Any harm inflicted on the victim to prevent him from dying clearly falls within the provisions of section

⁶³⁴ R Card, *Criminal Law*, pp. 175-176.

287. A shattered leg or arm may be amputated to avoid the victim bleeding profusely to death; a leg with a gangrenous wound may be amputated to avoid death from gangrene; a woman in labour may, in the case of a breech, be delivered by Caesarean section to avoid death from breech birth; a cancerous uterus or breast may be removed to prevent spread of the cancer and premature death; a failed kidney may be removed and replaced with a donor kidney.

Other cases are not so clear-cut. For example, may a cancerous breast or uterus be removed without the patient's consent to prevent cancer spreading to other parts of the body? While cancer of one organ is a less serious harm than cancer spreading to other parts of the body, the removal of the breast or uterus may well not be urgent thereby lacking the requirement of 'immediate necessity'. May a 'bariatric bypass' be performed on a severely obese person without his consent to save him from life-threatening obesity?

The special defence of 'interest of victim' under section 287 is not available only to medical practitioners. It is available to anyone who inflicts harm on another out of the immediate necessity of avoiding greater harm to the victim. A person who gives mouth-to-mouth respiration to revive another who is out of breath or who, having rescued another from drowning, presses that person's stomach to get out the water he took in, is not guilty of assault. Suppose that a man were to be bitten by a venomous snake. If a person in giving first aid makes a cut on the spot of the bite to enable blood to ooze out and so remove the poison, no offence is committed. Again, suppose that a man's leg or arm is caught in a vicious device from which the only way of release is cutting off the leg or arm. Anyone who does so to save the victim from some greater evil (e.g., bleeding to death, being attacked and killed by a wild beast, or being crushed to death by the device) commits no offence. In fact he earns commendation.

(iii) Aesthetic/cosmetic treatment

Assaults on customers for the purpose of aesthetic treatment are lawful because consented to by the customers and because they do not present serious physical risk as to be against the public interest. The hairdresser, the barber, the masseur or masseuse, the chiropodist, the beautician, the person who does a face-lift, or the surgeon who does an aesthetic operation or extreme surgery, commits no assault if he performs the job with reasonable skill. These days, people readily and willingly subject themselves to extreme surgery for aesthetic purposes: weight loss through removal of excess fat from the body, reshaping of the nose, breast implants, thickening of the lips, plastic surgery, vaginal procedures, and so on. In some cases, however, extreme medical procedures are performed for therapeutic reasons. In many cultures tattooing as well as scarification is performed for cosmetic reasons. The

conduct is not penalized.

Force lawfully applied but without the victim's consent. There are circumstances in which force may lawfully be applied to one who does not consent. There are four such cases: where force is used in the due execution of the law; where force is used in lawful correction; where force is used in defence of person or property; and where force is used in the context of provocation.

(i) Force used in the due execution of the law

No offence is committed when an act or omission is done in execution of the law or is authorized by law, and performed in accordance with the conditions prescribed by law (s.76). The law authorizes, in certain circumstances and subject to certain procedures, the entry of certain public servants into private residences against the will of the occupant. Thus an officer who makes an arrest, or who uses force, or who executes the lawful sentence of a court, breaks no law but, in fact, acts in execution of it.

The right to use force is correlative to the right to arrest, whether with or without warrant. Such force as is necessary in the circumstances may be used by an officer of justice to effect the arrest of a person resisting arrest, or in order to serve civil process upon a person. It is lawful for a person who is engaged in the lawful execution of any sentence, process or warrant, or in making any arrest, and for any person lawfully assisting him, to use such force as may be *reasonably necessary* to overcome any force used in resisting such execution and arrest.⁶³⁵ The force used is limited to that necessary for the purpose of effecting the object in view, and if there is an excess of violence the officer is guilty of assault. Furthermore, *ex hypothesi*, the authority which the officer, etc seeks to exercise must be one given by law and it must be executed in a regular and lawful manner.

Officers of justice are conservators of the peace and are invested with large powers and duties for the purpose of preserving the peace, preventing the commission of criminal offences, apprehending offenders and executing the warrants of the court or of a judicial officer.⁶³⁶ In the exercise of his powers and the discharge of his duties the officer is justified in using so much force as is reasonably necessary to attain the object in view. The justification extends to persons lawfully acting in aid of the officer and to private persons lawfully making an arrest, and extends to preventing the escape before or after arrest of the person to be arrested and to preventing his rescue by others.⁶³⁷

⁶³⁵ Schedule III (B), section 66(4).

⁶³⁶ Schedule III (B), sections 65(2), 66(2)(3), 70.

⁶³⁷ Schedule III (B), sections 65(1), 67-69.

(ii) Reasonable parental correction of children

The right to inflict reasonable personal chastisement on one's child has always commended itself to the common sense of mankind. It is clear law that a parent may chastise his child. Consistently with very ancient practice, a parent may delegate this right to the schoolmaster who is entrusted with the bringing up and discipline of the child. A schoolmaster may chastise his pupil and a master his servant or apprentice. However, the chastisement must be moderate in the manner, the instrument, and the quality; and the child must be old enough to appreciate correction. The subject is governed by section 41 of Schedule III (B).

The section provides that a blow or force, not in any case extending to a wound or grievous harm, may be justified for the purpose of correction. It is lawful for a father or mother to correct their legitimate or illegitimate child, being under 16 years of age, or any guardian or person acting as guardian, his ward being under 16 years of age, for misconduct or disobedience to any lawful command. The privilege of a person *in loco parentis* to correct a child does not extend to an elder brother or sister or other relative, unless they have been placed *in loco parentis* by an absent parent. A master may correct his servant or apprentice, being under 16 years of age, for misconduct or default in his duty as such servant or apprentice. The right is that of a master vis-à-vis his servant. A servant has no right of correction against another servant. An upper-servant cannot therefore justify beating an under-servant for disobedience to orders.

A father or mother or guardian, or a person acting as guardian, may delegate to any person they entrust permanently or temporarily with the governance or custody of their child all their authority for correction, including the power to determine in what cases correction ought to be inflicted; and such delegation if not expressly withheld is always presumed in the case of a schoolmaster or a person acting as a schoolmaster in respect of a child or ward. The power delegated by the parent to the schoolmaster includes an authority over the child while he is outside the four walls of the classroom. Any person authorized to inflict correction under s.41 may in any particular case delegate to any fit person the infliction of such correction. No correction is justifiable, which is unreasonable in kind or in degree, regard being had to the age and physical and mental condition of the person on whom it is to be inflicted. And if the person being corrected is by reason of tender years incapable of understanding the purpose of the correction, it cannot be justified.

It is important to appreciate that s.41 does not give a general right of domestic chastisement. A parent, master, or teacher may not inflict corporal chastisement on a person above 16 years of age. Any such chastisement is

unlawful and punishable as an assault. Further, the section does not authorise domestic violence between spouses. Wife-battering, husband-battering, and malicious castration (so-called 'Bobbitting'), are all cases of criminal assault.

Section 41 is probably an archaic piece of legislation that ought to have no place in a modern statute book. Current human rights discourse, sustained global and domestic campaign against child abuse, the United Nations Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child are clear statements that corporal chastisement ought to be relegated to the dustbin of history. In fact, in progressive countries, corporal chastisement, whether as a form of penalty under the criminal law or as a form of discipline at home or in school, has been proscribed on the ground that it is unconstitutional and a violation of domestic and international human rights law.

(iii) Defence of self or of another

The use of force is lawful for the necessary defence of self or of others, or the defence of *any right* of oneself or *any right* of another person (section 84(1)). This justification is limited by three conditions. First, the infringement against which one is retaliating must be an unlawful infringement. Secondly, the retaliation must be dictated by an immediate necessity (i.e., the retaliation must be both necessary and immediate). Thirdly, the retaliation must be reasonably proportionate to the unlawful infringement. The law presumes, irrebuttably, that a retaliation extending to the intentional killing of the aggressor is proportionate to any attack causing a reasonable apprehension of death, or of grievous harm, or of rape, or of sodomy (section 84(2)). 'Lawful defence' as a defence of general application under the Code is thus wider in scope than the law of 'self-defence' in some jurisdictions, which, as the name implies, is confined to the defence of oneself.

If **A** is about to stab **B** with a knife and **C** knocks **A** unconscious with a karate chop, **C** cannot be charged with assault as he acted in lawful defence of **B**. The defence is not shaken by the fact that **B** is a complete stranger to **C**. Similarly, a person acts in lawful defence if he beats another who is wrongfully endeavouring, with violence, to dispossess him of his land or goods, or the land or goods of another person. A man also acts in lawful defence if he beats, wounds, or maims a person making an unlawful assault upon his own person, or that of his wife, parent, child, master, or neighbour. Again **C** acts in lawful defence if he inflicts grievous injury or even kills a person attempting to murder one who is even a stranger to **C**.

Suppose that **A** strikes **B** a blow. **B** is entitled to strike back in defence of self. But **B** need not wait until he is struck. Nor need he retreat. He can anticipate the blow by a pre-emptive striking of **A** in self-defence. However, **B** has no right to revenge himself. If when all danger is past **B** strikes **A** in

purported defence of himself, the blow is a revenge not lawful defence. It is not lawful defence because the requirements of immediacy and necessity are not satisfied and **B**'s conduct would amount to an assault against **A**. Further, a trifling assault would not justify a grievous harm such as cutting off a leg or an arm, or biting off a man's lower lip, his finger, or his ear. The requirement of proportionality must be satisfied when returning violence with violence. In *Kari Tizi Joel v. The People* (1982)⁶³⁸ the deceased, a soldier, assaulted the appellant in his house, giving him a snake's beating with a soldier's belt. The appellant reacted by knifing the soldier who died of the wound received. Self-defence was successfully pleaded.

(iv) Provocation

In some jurisdictions, the plea of provocation is available only on a charge of homicide. In this country, however, provocation is not a defence particular to a specific crime but a defence of general application. It is thus a valid plea to a charge of assault, though if it succeeds the effect is merely to diminish responsibility and a consequential reduction of sentence.

Section 85 of the Code provides that responsibility shall be diminished for an offence immediately provoked by the unlawful act of another against the offender or, in his presence, against his spouse, descendant or ascendant, brother or sister, master or servant, or a minor or incapable in his charge; provided that the reaction be proportionate to the provocation.

If **A** unlawfully assaults **B** or someone closely related to **B** and in **B**'s presence, **B** may retaliate immediately in the first transport of passion and provided his reaction is proportionate to **A**'s assault, and provided also that the provocation was of a kind to deprive an ordinary person of self control, he can successfully plead provocation when charged with assaulting **A**.

Proportionality is a question of fact for the court to determine mindful of the circumstances of the case. It is not possible to enunciate a general rule as to what would be proportionate. But s.85 itself states an irrebutable presumption of proportionality in two specific instances. The section provides that intentional killing or wounding shall be proportionate to a provocation by violent blows or injuries; and that intentional killing or wounding of a spouse or that spouse's lover shall be proportionate to the provocation of finding them in the act of adultery. Thus in contemplation of law violent assault and adultery are provocative acts, a reaction against any of which, by the person provoked, may extend to murder or maiming.

⁶³⁸ Criminal Appeal No. BCA/18.c/82, unreported.

Offences against Bodily Integrity: Fatal Assaults

General. Homicide is the killing of one human being by another. All societies regard this as the most serious of crimes. Early English common law, for example, regarded it as a deed so serious as to admit of excuse within only the narrowest of fields. So long as the doctrine prevailed under which a man was held strictly accountable for any death that could be traced to his active conduct, there were very few exceptions to and no gradation of liability. Once a man was shown to have caused the death of a human being he was (except in a few cases) guilty of a crime even though he did not intend or foresee death as the result of his conduct. With the development of the doctrine of *mens rea* it became possible to distinguish between lawful and unlawful homicide and there came into existence different degrees of liability for unlawful homicide. Over the centuries the grounds of excuse have been extended and various degrees of liability have been established in those cases where the killing of a man by another cannot wholly be excused. The result is that two major categories of homicide can now be distinguished, unlawful homicide and lawful homicide.

§1. Unlawful homicide

Among the offences that fall under the category of unlawful or criminal homicide are different kinds of killing, some of which are cases of intentional killing while others are cases of unintentional killing.

1.1 Intentional killing

The offences that fall under this head are those in which both the assault (harm) on the victim and the result or consequence of the assault (death), are intended by the offender. The offender intended to inflict the hurt on the victim *and* he also intended death to result from the hurt thus inflicted. In *William Ngafor v. The People* (1969)⁶³⁹ Dervish, J delivering the judgment of the Court observed that to find an accused guilty of murder “there must be evidence to show, not only that death ensued as a result of some act committed by the accused, but also that he intended that the act should cause death.” Murder *simpliciter*, ‘capital murder’ (i.e., heinous murder or assassination), parricide, infanticide, and, controversially, abortion and suicide, are all cases of intentional killing.

⁶³⁹ (1968-1970) UYLR 56 at p. 58.

1.1.1 Murder simpliciter

Murder *simpliciter* (known in some jurisdictions as murder in the second degree) is committed when a person intentionally “causes another’s death” (section 275). The crime is punishable by life imprisonment. In *William Ngafor* the Court said, “In our opinion for either section 275 or section 276 to apply, it is necessary for the prosecution to prove that the act of killing amounts to murder. When that is done, and only then, will the accused be liable to life imprisonment under section 275 or to the death penalty under section 276 if the murder was committed in circumstances described in that section.”

Murder is intentional if the offender meant to cause the death of the person actually killed, or that of some other person he ran into; and it matters not that his intention depended on the fulfillment of some circumstance or condition, or that he was mistaken as to the identity of his victim (section 284). In *The People v. George Atah Menchuke* (1979)⁶⁴⁰ the respondent went on a hunting expedition with Michael Niba and Linus Lobaka, the deceased. The respondent and Lobaka went to a different part of the forest while Niba remained alone. Shortly after this separation, Niba heard the shot of a gun followed almost immediately by a whistle produced by the blowing of an empty cartridge tin. Niba traced the direction of the whistling and met the respondent who told him that he had a ghastly accident. The respondent and Niba went to the place of the claimed accident. There, Niba saw Lobaka lying dead on the ground and noticed that the body had a gunshot wound. The respondent confessed to the killing but said in defence that it had all been a mistake as what he saw and shot at was something that resembled an antelope. The Court did not believe his tale about an antelope and held that he was guilty of murder.

It follows that murder is committed when the offender intended not only his act (stabbing, assaulting, poisoning, shooting, strangulating, beheading, drowning, suffocating, etc.) but also the result thereof (death). Murder is thus committed when an assault by the assaulter and the death resulting from the assault are both intended by the said assailant. In *The People v. Nchindia Isaac* (2004)⁶⁴¹ the accused went to an off-licence bar where he got drunk and became involved in a brawl. He was thrown out on the yard where he lay for several hours before some people took him to a nearby hospital to be treated for some minor cuts. At the hospital the accused refused treatment and started making a lot of noise. Attempts by the nurses and others, including the deceased, to get him to be quiet came to no avail. He threatened to do to ‘somebody’ what he had intended to do that night to a named person at the off-licence bar. He assaulted the deceased who then decided to leave the scene

⁶⁴⁰ Criminal Appeal No. BCA/6.c/79, unreported.

⁶⁴¹ (2005) 2 CCLR 1-125 Part 11, p.81.

and return to his house, which was barely five minutes' walk from the hospital. The accused pursued him and, using a knife he had all along been carrying in his bag, stabbed the deceased eight times, some of the stab wounds as deep as 18 cm. The deceased was found a few minutes later in a pool of blood and by the time he was conveyed to the hospital he died. The accused having departed the scene of the crime went back to his house and had a good meal and some change of clothes. Police investigations eventually led to the arrest of the accused whose defence at the trial was simply a barefaced denial of the facts.

The evidence against the accused was, as in many cases of this nature, circumstantial. But Menyoli J. sitting at the Lebialem High Court in Menji had no difficulty in finding the accused guilty of murder contrary to s. 275 after a thorough consideration of the evidence. He sentenced the offender to life imprisonment.

In arriving at the conclusion which he rightly did the learned trial Judge made the following logical inference from the facts as they emerged from the evidence adduced at the trial: "The accused not only had the opportunity to stab the deceased, but from the circumstances one could rightly infer that he stabbed the deceased, soiling [his clothes] with the latter's blood in the process. It is not a coincidence that barely five minutes after the accused was seen pursuing the deceased with a knife, the latter was discovered in death throes after being stabbed several times with a sharp object. ... Nothing demonstrates the accused's *mens rea* more palpably than the fact that he stabbed the deceased 8 times as per the post-mortem report. The depth and the girth of the wounds, especially the one on the deceased's back that measured 18 cm by 5 cm, is a clear indication that the blows were delivered with force, and therefore, with the intention to cause death or grievous bodily harm."

In *Usumanu v. The People*⁶⁴² the appellant, a cowherd, while tending his cows in a field at Mutang-Fundong near Njinikom saw them suddenly scatter and blamed the only other person in the vicinity, Sabi Kumbong who had been cutting bamboo nearby. A quarrel ensued followed by a fight, in the course of which the appellant became possessed of Sabi Kumbong's machete and killed him with it. He was charged with murder under the Criminal Code then in force. At the trial the appellant admitted that he killed the deceased, but pleaded self-defence or, in the alternative, provocation. According to his testimony the deceased attacked him first with his machete. As the deceased raised his machete to cut him with it he raised his left hand to defend himself and sustained serious injury to his left wrist. He then succeeded in wrestling the machete from the deceased and used it to deliver the fatal blow on him. Kesiro J. sitting in the High Court at Bamenda did not believe the appellant and, relying on medical evidence adduced in court, held that the appellant's injury was self-inflicted. On the plea of provocation the learned trial Judge

⁶⁴² (1968) W.C.L.R. 17.)

found that there was no provocation to warrant a reduction of the crime from murder to manslaughter. He then found the appellant guilty as charged and sentenced him to death. On appeal to the West Cameroon Court of Appeal it was held (Cotran C.J., Endeley J. and Dervish, Ag. J.), that the learned trial Judge did not approach the question of provocation on a view of the evidence most favourable to the accused and that the appellant did kill Sabi Kumbong upon provocation within the meaning of the law.

Their Lordships said:

“In English law, the most authoritative statement on killing upon provocation is that of Devlin J. in the case of *R. v. Duffy* (1949) 1 All E.R. 932. It runs as follows: ‘Provocation is some act or series of acts done by the deceased to the accused which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for the moment not master of his mind.’ It is pertinent, while dealing with the matter of provocation, to cite the judgment by the Federal Supreme Court of Nigeria in *R. v. James Adekanmi*, 1944, XVII N.L.R. 99 at page 101, where it was held that the question of an accused person’s cultural status should be considered in order to determine the issue of provocation. When the evidence shows a provocative act committed against the accused by the deceased, using ‘provocation’ in its non-technical sense that act, although it might not be such as to amount legally to provocation if committed against ‘an educated and civilized person’, should be considered to be legally provocation if committed against ‘an illiterate and primitive peasant’, whose passions ‘are far more readily aroused than those of a civilized and enlightened class’. This decision has much application in the present case. The accused (appellant) is a simple cowherd. In the sudden encounter he saw the deceased armed with a cutlass while he himself was completely unarmed. We are inclined to the view that his passions were immediately aroused and in the heat of the moment he thought he was engaged in a life and death fight with deceased, and if he does not kill the deceased, the deceased would kill him. There was certainly no time for his passions to cool. ... The settled rule of law is that the onus always remains on the prosecution to prove absence of provocation. If there is any doubt whether the facts show sufficient provocation to reduce the killing to manslaughter, the issue must be determined in favour of the accused.”

The appeal was accordingly allowed and a verdict of manslaughter substituted for that of murder⁶⁴³ and the appellant sentenced to 10 years imprisonment.

In *Aliyo Lahpana Ndimasa v. The People* (1968)⁶⁴⁴ X, the appellant, cohabited

⁶⁴³ In the Penal Code capital murder as defined in s. 276 is punishable capitally and when reduced upon a successful defence of provocation the offence becomes either murder, attracting a life sentence, or assault occasioning death, punishable by imprisonment for from 6 to 20 years.

⁶⁴⁴ (1968-1970) UYLR 19.

with a woman, **Y**, the deceased, for four years during which time **X** went to prison for one year. After **X**'s discharge from prison the relations between him and **Y**, on the one hand, and between him and the father of **Y**, on the other hand, went sour. **X** was annoyed that while he was in prison **Y** moved her belongings to her father's home, spent 13.000 francs which he gave her before going to prison, and that since coming out of prison **Y**'s father always referred to him as a 'thief'. His anger was enlarged by the insistence of **Y**'s father that he must pay 21.000 francs dowry for his daughter if he wanted to keep her.

One day **X** saw **Y** talking with a man who was coming out of **Y**'s house and who ran away as he approached them. When **X** questioned **Y** about the man, a quarrel ensued between them. **X** picked up a cutlass and dealt a blow on **Y**'s neck. Blood gushed out and **Y** died almost immediately. **X** was seen running away from the *locus criminis* holding a cutlass, and managed to avoid arrest for ten days. When he was eventually arrested he appeared before Kesiro, J sitting at the High Court in Buea, charged with murder. He admitted killing **Y**, but said in extenuation that the killing was in reaction to being hit by **Y** on the shoulder with a stick. The learned trial Judge disbelieved him, found him guilty as charged, and sentenced him to death (which was then the prescribed penalty for murder).

His appeal to the West Cameroon Court of Appeal (Cotran, CJ, Endeley and Dervish, JJA) was grounded essentially on the issue of provocation. The line of argument canvassed on behalf of appellant was in effect that the deceased was caught talking to a man who then escaped on seeing the appellant approaching. That incident, it was argued, amounted to provocation, and, moreover, the respondents failed to call the man in question, who was a vital witness in the case. This failure to call a material witness, it was submitted, was fatal to the prosecution's case and the appeal ought to be allowed on that ground. *Victor Elango v. The People*⁶⁴⁵ was cited as authority for this submission. It was further contended on behalf of the appellant, relying on *Usumanu v. The People*⁶⁴⁶ where the Court substituted a verdict of manslaughter for that of murder, that appellant was also provoked when the deceased hit him with a stick.

In their judgment delivered by Cotran, CJ their Lordships held that the plea of provocation must fail. The learned Justices of Appeal did not see any provocation in the instant case, which could reduce the conviction for murder to manslaughter. They pointed out that *Usumanu* was distinguishable on the facts from the present case. They also pointed out that *Elango* was also distinguishable in that there the witness was most essential and vital inasmuch as he was the immediate superior of the accused to whom all company monies received by the accused were paid, and inasmuch as he was said to have

⁶⁴⁵ (1968) WCLR 14.

⁶⁴⁶ (1968) WCLR 17

received the money it was alleged the accused misappropriated. The appeal was accordingly dismissed and the conviction and sentence of death confirmed.

The law of murder plainly includes the following specific attitudes of mind: an intention to kill the person actually killed; an intention to kill some other person than the one actually killed (s.284), as where a man shoots at **A** but misses him and kills **B**; an intention to kill persons without regard to their identity, as where a man kills anyone he chances upon or as where he throws a bomb into a crowd killing several people; an intention to kill depended on the fulfillment of some circumstance or condition, as where a man decides to kill if he is jilted by a lover or as where a man intends to pursue a course of conduct while realizing that to do so may cause some person's death.

In murder simpliciter the intention to kill does not exist until just before the killing itself, and this is what distinguishes 'murder' from 'capital murder' where the intention to kill exists some appreciable time well before the killing. In *Marcelina N. Frederick v. The People* (1970)⁶⁴⁷ the husband of the appellant, a housewife just discharged from the hospital where she had undergone an operation, wanted to have sexual intercourse with her. She refused saying it was dangerous for her health as she had just had an operation and the wounds were not yet healed. The husband would not listen and when he tried to have sex with her by force a struggle ensued during which she picked up a hard object and hit him very hard on the head. He collapsed and died. She was arrested and charged with the capital murder of her husband, Frederick Okpare. Endeley, J sitting in the High Court at Buea held that the assault on the deceased was premeditated, deliberate and calculated, and that at all times before, during and after its perpetration, the appellant was in a mental state to well appreciate what she was doing and the obvious consequences of her acts. He convicted her and sentenced her to die by hanging. She appealed to the West Cameroon Court of Appeal (Cotran, CJ, Kesiro and Dervish, JJA).

The appellant gave three different versions of how she killed her husband. In the first version she stated: "When I was already asleep, I felt someone opening my legs and entering between my legs. Then I became awake, and saw that he was the one. Then I pushed him off and asked him what was happening. Then he replied that he wanted to have sexual intercourse with me. ... Then I asked him whether he wanted to kill me as he had said, because he was well aware of the fact that in the situation in which I was it was dangerous for me to do anything like that. Then he continued forcing himself on me. Then I took my two hands and forced him off again. By then he had already introduced his entire penis into my vagina. When he came off he carried me off the bed and knocked me on the floor. I got up and took something and knocked him with it."

In the second version she said, "When I was asleep I heard somebody

⁶⁴⁷ (1968-1970) UYLR 96)

opening my legs to introduce his penis into my vagina. I asked him whether he really wanted to kill me as the doctor had warned me not to take part in sexual intercourse, but he said I could die, that was nothing to him. But I managed to force myself away and fell down and suddenly the lamp, which was standing by our bed, went off. While I was on the ground crying my husband sat on the bed for some time and again slept. After I had cried a lot I became very much annoyed, got an object which I do not know, hit him and started running away.”

In the third version explaining the circumstances of the killing the appellant said, “When I was asleep my husband came near my legs and asked that I allow him have sexual intercourse with me. ... When I told my husband that I could not allow him to have sexual intercourse with me, he decided to force me into having it. I then pushed him away from me. He then gave me another slap. When I tried to get away from the bed he held me and threw me to the ground. I started crying. When I was tired of crying I stopped and fell asleep on the floor of our bedroom. When I woke up from sleep it appeared to me that I was fighting with my husband. Without being quite myself, I turned round seized something I lay my hands on and started hitting him with it. After hitting him I started to run away.”

The appellant thus admitted killing the deceased. However, it was argued on her behalf that the slaying did not amount to capital murder in that there was no premeditation and that it was “committed under provocation of such a nature as to reduce the charge of capital murder to one of manslaughter under s. 278.” The Appeal Court found no merit in the argument relating to provocation.

Their Lordships made the following statement, which many might consider controversial and female-insensitive:

“In the present case there is no doubt that the appellant was assaulted by the deceased on two occasions that night and also that the deceased attempted to have sexual intercourse with her against her wish. But the assaults were by his bare hands and cannot be considered violent. In fact the appellant herself stated in her evidence that the deceased gave her a single slap. It may have been heavy, for she fell down, but in our opinion it could not have been of such a violent nature as to justify the use of the weapons with which the appellant inflicted the fatal injuries. Nor do we think that the attempted intercourse with the appellant amounted to provocation of such a nature as to justify the use of these weapons. We have no doubt that the appellant must have been very distressed that night because of the two assaults on her and apparent disregard of her husband for her health and wellbeing, but we do not consider that these constitute sufficient provocation in law to warrant the application of section 85 of the Penal Code.”

On the issue of premeditation the Court found that there was no evidence of premeditation to warrant a conviction under section 276. The Court

expatiated on the concept of premeditation this way.

“There is no scrap of evidence tending to show that she had planned the murder within a period of time sufficiently long for her to reflect which ought to have led her to abandon the scheme. In our opinion no matter which of the three versions the court may believe to be the true circumstances of the killing, it discloses no plan elaborated within a period of time preceding its execution sufficiently long for reflection. ... Even if one was to believe the most damning of her three versions [the second one] ... one cannot say the period of time between the decision to kill and its execution was sufficiently long to give her the opportunity to reflect on what she was doing. There was no evidence before the court tending to show at what point of time she made up her mind to kill and more specifically what period of time elapsed between her making up her mind and the actual killing. Indeed the nature and number of the wounds inflicted on the deceased equally tend to show a sudden and mad wish or desire to get rid of a husband who had ill treated her three times that night and who had told her that he was going to marry another woman, which must have created strong jealous feelings in her and aroused her passion further. In the state of mind in which appellant undoubtedly was on that night it cannot be said that she was sufficiently calm and collected to enable her to reflect on what she was about to do.”

The Court nevertheless found her guilty of murder under section 275 and sentenced her to 10 years’ imprisonment upon taking into account the following circumstances as mitigating factors: the fact that the appellant was assaulted twice by the deceased that night and that she was still suffering from the after-effect of an operation, the wound of which had not fully healed, and also the mental state in which she obviously was and that she was the mother of four minor children.

In another case neither the trial court nor the Court of appeal stated whether the matter was one of simple murder or one of premeditated murder, although from the sentence passed it might be deduced that it was a case of premeditated murder. The case is that of *Mbappe Moussa Awa Ngambo & 8 Ors v The People & Anor* (2007)⁶⁴⁸. The night of 8th January 2002 was a fateful one for one Garoua Akali Tchang, an officer of police in charge of the Mobile Police Intervention Unit in Bamenda. After spending some time with his student paramour at her place in Savanna Street, he left and was about to enter his car when he was shot by unknown persons. He drove himself to hospital where he later died. Police investigations into the killing led to the arrest of several persons including the appellants. The confessional statement of some of the arrestees indicated that a gang had been hired by the deceased’s lover to do the job. Appellants were committed for trial, strangely, in a military tribunal and promptly convicted. Of the nine appellants, seven (including the

⁶⁴⁸ Appeal No. BCA/3c/2004, unreported.

deceased's paramour) were sentenced to death by firing squad and one was sentenced to two years' imprisonment for being accessory after the fact. The prosecution of one person abated following his death during the trial. Except for the deceased's paramour whose conviction and sentence were quashed on grounds of benefit of doubt, the conviction and sentences of the other appellants were upheld by the Court of Appeal (Morfaw, CJ, President, Njilele, JA, Vice President, and a military assessor).

The Court gave short shrift to arguments by appellants' counsel impugning the fairness of the trial conducted by the military tribunal. "The strict rules of an English criminal trial may not have been vigorously applied," conceded Njilele J who delivered the judgment of the Court, "but there is evidence that the accused had every opportunity to present their defence. The polemics about a military tribunal speaking in a language [French] little understood in the area of the trial [English-speaking] and applying a procedure [French-derived] which is strange in the jurisdiction is now of no relevance since the procedure has been harmonized. What is important is to determine whether the trial was conducted fairly and equitably."

On this reasoning, wholly lacking in merit, there would in fact be no need for rules of procedure at all. Every appeal would stand or fall on each appeal bench's peculiar understanding of "fair and equitable." Further, the learned justices of appeal missed defence counsel's compelling argument, which is that the military tribunal conducted the trial in French and following French-derived criminal procedure. At that time there was no harmonized criminal procedure yet. Surely, this matter must be relevant; otherwise why was the trial not conducted in English and following English-derived criminal procedure? It has often been said that justice must not only be done but must be seen to be done as well. Further still, throughout the entire judgment of the Court of Appeal there is no mention whatsoever of the section of the law under which the appellants were charged. There is no indication of the causal link between the gunshot wound and the subsequent death, especially in light of the fact that the deceased drove himself to hospital. Worse, the military tribunal convicted of murder and proceeded to pass the death sentence. This was an illegal sentence. The death penalty is provided for capital murder and not for ordinary murder. It is surprising that these points completely escaped the attention of both counsel and the Court. Again, not for once did the Court address its mind to the issue of premeditation. The Court appears to have proceeded on the *assumption* that since there was some evidence suggesting a contract killing therefore the death was premeditated and the perpetrators deserving of capital punishment.

The Code is silent as to when death should occur. There is hardly any difficulty if death is instantaneous or occurs within hours or days. But problems emerge when the death occurs months or years later. The issue here

is the complex problem of causation. A simple illustration of this involved topic, which is discussed later, is the sad case of *The People v. Ambe Fosama* (1981)⁶⁴⁹. The daughter of the respondent had some bruises allegedly inflicted by Alfred Chi, a schoolboy, when he assaulted the girl the previous day. The respondent in the company of his daughter confronted Alfred Chi who denied being responsible for the bruises on the girl. Respondent slapped Alfred Chi on the temple with his palm and left. Alfred Chi went to school and continued doing so for several weeks with no complaints. Three months later he complained of severe pains on the temple where the respondent had slapped him. He also complained of difficulty with his vision. Neither the hospital nor ‘native doctors’ could be of any help. He later went completely blind and eventually died.

The respondent was arrested and charged with assault occasioning death contrary to s. 278 (1) of the Penal Code. A post mortem examination was ordered. The medical officer who carried out the examination stated in his report as follows: “The brains were dissected but there was no visible intracranial bleeding. No rupture of any blood vessels. But there was a mighty tumour at the orbital, which caused serious damage. I certify the cause of death to be tumour of the right orbital.” He explained in his evidence in court that “tumour is a gland which interferes with the body metabolism and it renders the patient anemic and it damages the body tissues and cells. Tumour is not caused by trauma. It is a disease caused by the body metabolism. It is a body disease.” On these facts and medical evidence Njamnsi, J sitting at the Mezam High Court held that the act of the respondent was not a direct cause of the death of the deceased so as to warrant a conviction for an offence as charged. The prosecution’s appeal fared no better. Madam Justice Arrey delivering the judgment of the Bamenda Court of Appeal (Nyo’ Wakai, CJ, Anyangwe and Arrey, JJA) dismissed the appeal stating that it was clear from the evidence adduced that “there was no nexus between the slap and the cause of the death of the deceased.”

After cryptically defining murder the Code then goes on to deal with different and more serious degrees of murder. These other cases of homicide go by a variety of names depending on such factors as the particular heinous circumstances of commission of the crime (capital murder, felony-murder), or on the status of the victim or the degree of consanguinity between victim and murderer (parricide, infanticide, abortion, child destruction).

1.1.2 Capital murder

What the Code calls ‘capital murder’ (section 276) is known as ‘murder in the first degree’ in a number of jurisdictions, and ‘assassination’ in some other

⁶⁴⁹ Criminal Appeal No. BCA/22.c/81, unreported.

jurisdictions. Capital murder is murder committed after premeditation or by poisoning or in the course of committing another crime either as principal or accessory. This category of murder is punished capitally (i.e. by death) and for that reason is termed ‘capital murder’.

‘Capital murder’ is thus murder aggravated due to the fact of its commission in any of the following three circumstances: after premeditation, by poisoning, or in the perpetration of another offence. This offence thus collapses into one crime a variety of conduct separately punished in some jurisdictions, namely, ‘murder with malice aforethought’, ‘poisoning’, and ‘felony murder’.

Premeditated murder. Premeditation is the intention to kill formed well before the killing. It presupposes a deliberate murder planned well in advance rather than on the spur of the moment. The concept was defined in the case of *Procureur-General of the Federal Court of Justice v. Aliyo Lahpana Ndimasa* (1969) in the ultimate appeal decided by the defunct Federal Court of Justice as “at least a plan elaborated within a period of time preceding its execution sufficiently long for reflection which ought to have led to the abandonment of the scheme.”

Applying this definition the West Cameroon Court of Appeal substituted a conviction for simple murder for that of capital murder in the appeal case of *Mahaman Tchiv v. The People* (1970)⁶⁵⁰. The appeal stemmed from the decision of the West Cameroon High Court Assizes in Bamenda in which the appellant was found guilty of the capital murder of one Bannah Maurice at Nso, by the infliction of fourteen stab wounds, and was sentenced to death by hanging. The deceased and **X** went to the appellant’s house to serve him a court summons. The deceased stood some five yards outside the house and **X** went inside to serve the summons. While **X** was writing an endorsement on the summons document the appellant went into an adjoining room for about a minute, came out and then went out of the house. About a minute later **X** heard a struggle outside, followed by the noise of running. **X** ran out. He saw the appellant chasing the deceased. Appellant knocked the deceased down and stabbed him several times with a knife. Appellant was arrested and at the trial admitted knifing the deceased several times, but said he did so out of annoyance because the deceased had asked **X** to handcuff him and because the deceased gave him teeth bites when he knocked him down. The learned trial Judge disbelieved him, convicted and sentenced him. He appealed.

The appeal hinged mainly on whether the killing was premeditated or not. In deciding this issue the Court considered among other things the Cyprus

⁶⁵⁰ Criminal Appeal No. WCCA/3.c/70, unreported.

case of *R. Halil Shaban*⁶⁵¹, which the Court regarded as having some persuasive authority. Cyprus criminal law also distinguishes between simple murder and capital murder, the basis of the distinction being the requirement of premeditation regarding the offence of capital murder. In that Cyprus case a mounted policeman, galloping at full speed, was pursuing an armed man running on foot. The armed man suddenly stopped, turned and shot the policeman dead. The test employed by the Cyprus court was whether in all the circumstances the man had had a sufficient opportunity after forming his intention to reflect upon it and relinquish it. After examining the evidence the court concluded that it was impossible to say when the intention to kill had been formed by the armed man and therefore that there was a reasonable doubt on the question of premeditation.

The West Cameroon Court of Appeal opined, in the light of *Aliyo Lahpana Ndimasa* and of *Halil Shaban* that the period for reflection must necessarily vary with each set of circumstances. Having regard to the evidence of the only witness, **X**, on the critical matter of time, which the Court accepted, their Lordships (Cotran, CJ, Dervish and O'Brien Quinn, JJA) held that in the instant case the appellant had not had the necessary time in which to reflect on the gravity of the offence before actually committing it. In the result, the Court quashed the conviction of capital murder under section 276(1)(a) and substituted a conviction of simple murder under s. 275, and then went on to impose a sentence of 20 years in the light of what the Court regarded as mitigating circumstances.

Similarly, in *The People v. Ngu Barnabas* (1987)⁶⁵² it was held that the element of premeditation was not made out. The accused and his girlfriend had been out drinking at an off-licence bar. Later he killed her under circumstances that remained obscure. The two were apparently still on friendly terms thirty minutes before the incident leading to the death of the deceased. It was held, controversially, it is submitted, that the accused could not be said to have within thirty minutes premeditated the death of the deceased. The court accordingly found him guilty of the lesser offence of simple murder and sentenced him to 25 years' imprisonment. Thirty minutes is certainly a sufficient time within which to form and seriously reflect upon an intention to kill. The trial judge would have been on firm grounds had he based his decision on the reasoning that it was impossible to tell precisely at what moment the accused formed the intention to kill his girlfriend (Was it before he took her out for what turned out to be her last drink? Was it while they were having the drink? Was it after the drink and just before the killing?), and that this uncertainty created a reasonable doubt in the mind of the court as to whether the slaying was premeditated.

⁶⁵¹ (1908) 8 C.L.R.82.

⁶⁵² Suit No. HCB/18.c/87, unreported.

The prosecution also failed to establish the element of premeditation in the case of *The People v. Mama Kiponu* (1986)⁶⁵³, where the accused stabbed and killed the deceased at a traditional ceremony known as ‘sala’. The court found the accused guilty of the lesser offence of simple murder and gave him the maximum sentence of life imprisonment.

But the High Court for Meme Division came to a different conclusion in *Bea Richard Andumu v. The People* (1981)⁶⁵⁴. This is a case in which that court found the appellant guilty of the capital murder of one Itoe Peter Elangwe and sentenced him to die by shooting, a decision confirmed on appeal. The indictment was laid under section 276 of the Penal Code. The deceased and the appellant lived in Big Bakondo. In the evening of 27th April 1980 the deceased and his family were having supper when appellant knocked at the door of the house, got in and inquired whether the deceased had beaten a little girl named Mambe. When the deceased asked appellant whether he had found out from the girl why she was crying, appellant gave deceased a slap. A fight between the two ensued. They were separated. The deceased then decided to sue appellant in the customary court, apparently for the assault. Shortly afterwards appellant and the deceased met at a small shop as the deceased made his way to the house of the customary court clerk to file a suit against appellant.

Meanwhile, appellant went to his house, changed his shirt and returned to the small shop holding a long knife. As the deceased was returning from the home of the court clerk the appellant confronted him holding the knife and telling him he would kill him. The deceased ran away with appellant in hot pursuit. The deceased slipped on the muddy road and fell. Appellant caught up with him and twice stabbed him, one deadly wound in the back and another in the armpit. There was consternation and confusion. There were cries for help. The deceased bled to death on the spot where he had been fatally stabbed. In the midst of the ensuing confusion the appellant made his escape. The village organized a search party. The appellant was apprehended the following day in the late afternoon and handed over to the police. The post-mortem report read: “Approximate date of death: 27 April 1980. Approximate hour of death: about 7:30 p.m. Brief notes of post-mortem findings: deep penetrating knife wounds of axillary areas, severing major vessels and lung. Conclusion: death from hemorrhage.”

Appellant admitted the stabbing and thus the killing. The only issue before the Court was whether the killing was premeditated. Adopting the definition of premeditation that was given in the *Ndimasa case* (1969), the Court said premeditation is more than the intention to cause grievous harm or the intention to kill formed in the excitement of the moment. It requires at least a

⁶⁵³ Suit No. HCB/109.c/86, unreported.

⁶⁵⁴ Appeal No. CASWP/2c/81, unreported.

plan elaborated within a period of time preceding its execution sufficiently long for reflection which ought to have led to the abandonment of the scheme. That definition had also been adopted in *Marcelina Frederick v. The People* (1970). The Court then asked whether in the instant case there is any circumstance or set of circumstances that could lead to the inference that the Appellant did elaborate a plan over a period to kill; if he had suddenly formed the intention to kill whether he had sufficient opportunity after forming it to reflect upon it and abandon it. The Court recalled the facts as stated above and concluded as follows. “If the Appellant had formed the intention to kill the deceased when he had left the house of the deceased he had planned the killing on his way home. He went to his house to get the means of carrying out his intention. Between the period he had gone to his house and the killing he had had sufficient time to reflect on his plan and consequences and then to abandon it. In the result we dismiss the appeal and affirm the conviction and sentence of the trial court.”

Murder is deemed premeditated notwithstanding that the identity of the victim is not decided on or that the enterprise depends on the fulfillment of a condition (section 276(2)). The notion of premeditation is adequately conveyed by the following old English common law expressions: ‘*malice prepensed*’, ‘*malice prepensée*’, and ‘*malitia praecogitata*’. The concept conjures the idea of a deliberate plan to kill and a sufficient or reasonable interval within which that plan was reflected upon but the resolve to kill remained unshaken. Examples of premeditated killings are murder by ambush, by torture, or by other barbarous acts. A person ambushes and murders another when he lies in wait for him, sets on him as he unsuspectingly comes along and kills him. Murder by ambush is in fact an insidious secret assassination, *occulta occisio nullo sciente aut violente*, as they used to say in the old days.

In *The People v. Ndansi John* (1985)⁶⁵⁵, the accused and his brother, the deceased, had a dispute over the raffia⁶⁵⁶ palm bush of their late father. One early morning the accused loaded his gun, went to the said bush, hid and lay in wait for the deceased whom he knew was going to come along that way. Soon afterwards he saw the deceased approaching. As the deceased came within firing range the accused shot him. The deceased died a few hours later. The court had no difficulty in convicting the accused of premeditated murder and in sentencing him to death.

The court also had no difficulty in convicting one Samgba Daniel of

⁶⁵⁵ Suit No. HCB/41.c/85, unreported. See also, *Katche Julius v. The People* (1988), Criminal Appeal No. BCA/1.c/88, unreported.

⁶⁵⁶ Raffia is a palm tree, botanically known as *Raphia ruffia*. It is said to be native to Madagascar. It has very long leaves. The fibres from its leaves are used for making hats, baskets, etc. The stems of the raffia are used as frames for building mud huts, and when dry, are also used as fuel wood. The sap of the raffia palm is a white sweet juice that is tapped, collected in calabashes, sold, and drunk; and is appropriately known as ‘palm wine’.

premeditated murder and in sentencing him to death. That was in the case of *The People v. Samgha Daniel* (1982)⁶⁵⁷. In that case a policeman was having a few beers at an off-licence bar located near the Buea Bus Station.⁶⁵⁸ A teenage boy, Wilson Itoe, was playing with his friends at the bus station. The policeman came out of the bar, pulled out his pistol, aimed at the boy and pulled the trigger. The gun did not go off. He readjusted it, aimed at the boy a second time and fired. The bullet hit the boy, killing him instantly. The accused was arrested and charged with capital murder. Mrs Justice Gwanmesia found him guilty as charged and sentenced him to death by hanging.

On the face of it the conviction for premeditated murder seemed surprising given the settled jurisprudence that the element of premeditation requires more or less an appreciable length of time sufficient for the accused to have thought over, and firmly resolved to carry out his intended action. But the evidence adduced at the trial was so conclusive on the issue of premeditation that any reasonable tribunal would have arrived at no other decision on this point.

Throughout the trial the accused himself insisted that he was neither drunk nor insane at the time of the killing. His only defence was that he did not know the deceased prior to the killing and that the slaying was purely accidental. This defence held no water. In the first place, there was no evidence before the court that the accused at the material time just happened to have had in his hands a gun that accidentally went off killing the deceased. Evidence before the court showed a sequence of actions that tended to suggest the accused had earlier resolved to kill somebody. The accused came out of the bar. He reached for his revolver, which was worn on the belt around his waist. He unbuttoned the holster. He pulled out the pistol. He undid the safety catch. He aimed at the deceased and pulled the trigger. The gun did not go off. He re-adjusted it. He aimed at the deceased a second time and for the second time pulled the trigger. This time the bullet ejected, hit the deceased and killed him instantly.

Secondly, expert evidence adduced at the trial established that on leaving his house on that fateful day the accused had forced a 13th bullet into the magazine of his revolver. That chamber normally holds a supply of twelve bullets that are fed automatically into the breach of the revolver. It was because a 13th bullet was forced into the gun that it jammed and failed to fire the first time the accused pulled the trigger. Why was it necessary for the accused to have forced a 13th bullet into the magazine of his revolver? The court drew from these two circumstances (the 13th bullet, re-adjusting the gun and firing a second time) the logical inference that the accused had planned to

⁶⁵⁷ HCSWP/6.c/82, unreported.

⁶⁵⁸ Locally a bus station is known as a 'motor park' by analogy with a car park. In other countries the same facility is known either as a 'coach station', a 'taxi rank', or a 'taxi stand'. The word 'coach' in this context refers to a bus, and 'taxi' includes a minibus.

kill before leaving his house in the morning of that day. The court rightly considered as immaterial the fact that the premeditation did not relate to a particular identifiable person.

Per Gwanmesia J,

“He [the accused] denies that he was drunk. He maintains that he was sane and normal. He insists that the shot from his gun was accidental. ... If the shooting of the deceased is alleged to have been an accident, the question that obviously should be asked is, why had the accused to re-adjust his gun to shoot a second time? If he wanted only to frighten the innocent boys, was it necessary for him to re-adjust his gun before shooting a second time? Of course the obvious answer is that having failed to achieve his aim the first time, accused re-adjusted his gun to execute his plan. And that plan was to kill anyone within his reach, no matter who that person was. And this obviously is premeditation. The question of knowing the victim before the act is of no consequence. If that were so then people will never be convicted of capital murder unless there is proof that the identity of the victim was known to the accused. ... Accused himself said he was not drunk and that he was normal. He therefore cannot benefit from s. 79 of the Penal Code. He therefore has no defence whatsoever to reduce the offence with which he is charged to a lesser offence.”

A classic case of capital murder is where the slayer ambushes and slays his victim. Killing by ambush is premeditated murder because every ambushcade presupposes a prior plan to attack. In *John Chia Munchu v. The People* (1979)⁶⁵⁹ the deceased visited a relative for an evening meal together. She was expected to return to her home that same night after the meal. After the meal she took leave and left. Just outside the house she was attacked and stabbed on the left side of the neck and slightly above the clavicle by someone who evidently had laid in waiting for her and who turned out to be the appellant. She died of the stab wounds. It was held that the murder was premeditated and that the conviction of the appellant for capital murder was proper.

If a man borrows a shotgun and cartridges from his neighbour under the pretext of going to hunt for game in the forest, loads the gun, goes by night to the home of a man against whom he has a grudge, lures him out of the house by tricks and then shoots him dead the killer is guilty of capital murder on the sufficient ground that the killing was premeditated. That is what happened in *Atembeng Oga (alias Opportunity) v. The People* (1971)⁶⁶⁰. The appellant was convicted and sentenced to death by Kesiro, J presiding over the Mamfe Assizes and he appealed to the West Cameroon Court of Appeal (Endeley, CJ, Dervish and O'Brien Quinn, JJA) against conviction and sentence on the ground that the decision was unreasonable and could not be supported having

⁶⁵⁹ Criminal Appeal No. BCA/29.c/79, unreported.

⁶⁶⁰ (1971-73) UYLR 1

regard to the evidence.

The facts that gave rise to the case are that the deceased had retired to bed at night when someone started raining stones on the roof of his house. The deceased got up, lighted his lantern and went out into the darkness to find out who was throwing the stones, and stop him. Minutes later, visitors who were passing the night in the house of the deceased heard the report of a gun and almost immediately they heard the deceased cry out, “Opporto, why are you killing me over my property?” They heard the deceased fall down. He died almost instantly. The frightened occupants summoned courage and came out of the house, raised a general alarm and the matter was reported to the police.

Investigations pointed to the appellant. He was found holed up in a house with a loaded shotgun and some cartridges. He was arrested and when shown the body of the deceased confirmed that the wound on it was a cartridge wound. He was charged with capital murder and put on trial. His defence was a complete denial that he was the killer. He admitted he had borrowed the shotgun and the cartridges found on him by the police from **X**, but said he did so to go and hunt for monkeys and that **X** gave him three and not four cartridges. **X** was however positive he gave him four cartridges. The appellant could not account for the missing cartridge, nor could he explain why he was holed up with the loaded shotgun he was found with, in the house where he was arrested.

Evidence adduced by the prosecution showed that the motive for the killing was the appellant’s unwillingness to render an account, as requested by the deceased, of his administration of the farms entrusted by the deceased to him and to hand over all monies realized from the sale of produce. Endeley, CJ, with whom Dervish and O’Brien Quinn, JJA concurred, held that the “fact of the gunshot wound was amply corroborated and supported by the fact that the deceased fell on the night in question and made his dying declaration immediately after the report of a gun was heard” and that the evidence at the trial, viewed as a whole, justified the learned trial Judge’s verdict. The appeal was accordingly dismissed and the conviction and sentence of death affirmed.

If a person openly threatens to kill a particular individual or any person falling within a particular class or group and subsequently lures and kills that particular person or a person of that particular class or group, the killing in such a case would be premeditated murder. In *Emmanuel Okumbo Angeh v. The People* (1969)⁶⁶¹ the appellant had, at a party given by the deceased, openly threatened that he would kill the deceased or “any Tinto man”, as he was disappointed at the meager quantity of palm wine served to him at the party. Three days later when the deceased, who was a Tinto man, visited the appellant he was invited at 7 p.m. to accompany the appellant into the bush to tap palm wine, which he foolishly but unsuspectingly did. Sometime later, the

⁶⁶¹ (1968-1970) UYLR 26.

appellant returned alone, wearing the deceased's shoes and giving varying accounts, when asked, of the deceased's whereabouts. It was not until eight days after the deceased's disappearance that the appellant reported that the deceased had got into difficulties and drowned in a river while they were both together in the bush. The body of the deceased was never found. The learned trial Judge, Kesiro, J sitting in the High Court at Mamfe, was satisfied that the appellant was last seen with the deceased as confessed by him and that it was the appellant who killed the deceased. He accordingly convicted appellant of capital murder and sentenced him to death by hanging.

An appeal to the West Cameroon Court of Appeal (Cotran, CJ, Endeley and O'Brien Quinn, JJA) was taken out against both conviction and sentence. It was contended on behalf of the appellant that the greatest possible care must be taken in a capital case based on circumstantial evidence alone. That evidence in the present case, it was argued, was equivocal in that the appellant's story of the deceased's drowning accidentally was perfectly credible. Moreover, there was no *corpus delicti*, the body of the deceased not having been found. Besides, it was further argued, the trial Judge attached too much weight to ordinary casual remarks, which bore no real significance. In reply, respondents argued that on the totality of the evidence the learned trial Judge could not have come to any other conclusion. Reference was made to the dictum of the Lord Chief Justice in the English case of *John Alexander Dickson*⁶⁶² when he said, "The evidence was entirely circumstantial, but circumstantial evidence derived from admitted facts proved against a person charged, is often must reliable, because it is not likely to be invented, and if invented, would, in all probability, not fit in with the immediate facts."

Having listened carefully to learned counsel on both sides and, having perused the authorities cited, the Court was of the opinion that the evidence of the threat made at the party coupled with the fact that the appellant invited the deceased to tap palm wine at an unusual and suspicious hour in the evening, the return home of the appellant wearing the deceased's shoes and giving various contradictory accounts of the whereabouts of the deceased can lead to but one conclusion and that is, that the appellant killed the deceased as he had threatened to do. The Court accordingly concluded that the appellant had deliberately and with premeditation murdered the deceased. It dismissed the appeal and confirmed the conviction and sentence of death.

Another case in which a threat of killing was openly made and subsequently carried out was that of *The People v. Susana Mbongteh & George Fongoh* (1987)⁶⁶³. In that case the 1st defendant, wife of the 1st prosecution witness, told husband menacingly, "You will see", words interpreted as a threat that she would do something that would hurt her husband. After uttering

⁶⁶² (1910) 5 Cr. App. Rep. 135 at p. 143.

⁶⁶³ Suit No. HCB/43.c/87, unreported.

those words she later took a taxi to the filling station. She bought five litres of petrol and took a taxi back home. Her husband was not home at the time. She poured the petrol round the house. The three young children of the marriage were inside the house. She poured some of the petrol on the children. She then set them and the house ablaze. The children and the house were reduced to ashes. Inglis J convicted her of capital murder and sentenced her to be taken to a place of lawful custody and there to be hung by the neck until she be dead.

A similar case is that of *Ukpai Umah v. The People* (1968)⁶⁶⁴. The case was an appeal against the judgment of Endeley, J in the High Court sitting at Buea, in which the appellant was found guilty as charged and sentenced to suffer death. The appellant and the deceased were on friendly terms. One day the deceased seized a portmanteau belonging to the appellant as security for a debt of about 2.000 francs which the appellant owed him and which the appellant had refused or was unable to pay. The appellant asked for the return of his portmanteau on several occasions but the deceased refused to return it unless the debt was repaid. One morning the appellant called at the house at which the deceased was staying and invited the deceased to go into the bush with him for the purpose of selecting suitable sites for laying traps, and both left about 8 a.m. The deceased was never seen alive again.

Ten days later the dead body of the deceased was found lying in a ditch in the bush. The postmortem examination stated the cause of death to be an injury on the head causing the fracture of the skull. The doctor found an oval hole of about 3 cm. in diameter on the left occipal bone of the head, which, according to the opinion evidence of the medical expert, could have been caused by a blow with the blunt side of the matchete that was shown to him in court. The appellant made a confessional statement the tendering of which he unsuccessfully tried to exclude on the ground that it was obtained from him under duress. It was on these facts that the trial court convicted and sentenced the appellant. After a review of the evidence, the West Cameroon Court of Appeal (Cotran, CJ, Kesiro, JA, and Dervish, Ag. JA) found no reason for disturbing the findings of fact and the ruling of the trial Judge. The evidence indubitably showed that this was a clear case of premeditated murder. In dismissing the appeal the Appellate Court quoted with approval the following statement of Cotran, CJ in *Ibadan Shodomowe v. The People*⁶⁶⁵: “The tests to be applied in a man’s confession are whether there is anything outside it to show that it is true, whether it is corroborated, whether the person making it had the opportunity of committing the offence to which he confessed and whether it is consistent with the facts which have been proved.” The conviction and sentence of death were affirmed.

It is clear from the authorities that a court will readily hold a killing to be

⁶⁶⁴ (1968-1970) UYLR 22).

⁶⁶⁵ 1965-1967) WCLR 56.

premeditated murder where the circumstances of the killing indicate something in the nature of a ritual murder. An example is afforded by the gruesome killing in the case of *Simon Egbo Kaba & 4 Others v. The People* (1970)⁶⁶⁶. The appellants were indicted before the High Court sitting at Bamenda, with Kesiro, J presiding. They were charged with the capital murder of Anthony Akwa at Befang village in Wum. The learned trial Judge in a considered judgment found all five appellants guilty of the charges as laid, and sentenced each to death by hanging. From the conviction and sentence they appealed to the West Cameroon Court of Appeal (Cotran, CJ, Endeley and O'Brien Quinn, JJA). The deceased was a Public Works Department headman residing temporarily at Befang. One day he left his house but did not return. This fact was reported to the village chief and the Gendarmes, and investigations commenced. In searching around the village and its suburbs the deceased's dead body was discovered submerged in water at the edge of a river at a place some seven miles away from Befang village.

The local medical officer, acting on a Coroner's Order performed an on-the-spot postmortem examination of the deceased's body. The report of the said examination stated in relevant parts: "The body was removed from the river to the banks naked, with penis and testis missing. The penis was neatly cut out leaving the skin of the scrotum. The left eyeball was removed from the socket. There were multiple linear wounds on the baldhead. One of the wounds was about 3 inches long and reached the skull bone. It was a clean cut wound inflicted with a sharp instrument. The tips of the fingers, toes and lobes of the ear were eaten up by fish. There was no noticeable distention of the abdomen and there was no fluid exuding from the abdomen on pressure. On cutting open the back of the neck it was found that the head had been severed from the rest of the body and blood clots were also seen in the area. The vertebrae were not broken. The lungs were not water logged. There was no sand in the stomach. Cause of death: In my opinion the cause of death is due to the injuries on the head and neck. The man must have been murdered and then thrown into the river as there were no signs of drowning observed."

Five people were eventually charged with the murder of the deceased. During interrogations by the Gendarmes the 1st appellant made a confessional statement. Evidence materially linking the other four appellants to the murder was got from X. But X turned out to be a hostile witness and her evidence was expunged from the records of proceedings in the court below. During the hearing of the appeal counsel for the respondents conceded that in the absence of X's evidence, there was no evidence sufficient at law to justify the Appellate Court upholding the conviction of the 2nd, 3rd, 4th and 5th appellants. Having scanned the records and the exhibits thoroughly the Appeal Court was in complete agreement with the learned counsel's submissions and accordingly

⁶⁶⁶ (1968-1970) UYLR 101)

allowed the appeal in respect of those appellants.

Regarding the 1st appellant it was contended on his behalf that the appellant having stated that his confessional statement was made under duress the trial court ought to have conducted a trial within the main trial to try the issue whether or not the confessional statement was made voluntarily, and thereafter ruled on its admissibility before proceeding to act on it. The Court was then urged to reject the statement as involuntarily obtained and thus offending against section 28 of the Evidence Ordinance. In reply counsel for the respondents drew attention to the fact that when the confessional statement was tendered at the trial, no objection was raised to their admissibility and no issue was made out of the said admissibility. Once the statement had been admitted, he argued, relying on *Ibadan Shodomowe*, all that the court had to address its mind to was its probative value. The Appeal Court also agreed with this submission of learned counsel and held, dismissing the appeal by 1st appellant that the conviction and sentence were proper.

In *The People v. Christopher Okoye* (1975)⁶⁶⁷ the accused was charged with capital murder contrary to section 276(1)(c). The accused and one other suspect were being taken in an open police vehicle from a police station to the main police office. The deceased, a policeman in uniform and with a loaded gun, together with the two suspects were riding at the back of the vehicle. While the vehicle was in motion and going over potholes on the road, the accused, in order to escape, seized the gun from the deceased, shot him with it, jumped out of the vehicle and started to run away. A crowd gave chase to the assailant and caught him. The fatally wounded policeman was taken to the hospital where he died on arrival there. At the trial the main defence was infancy. The accused put his age at 16 years. Medical evidence put it at 21 years. Njamnsi J accepted the medical evidence, convicted the accused as charged and sentenced him accordingly.

However, in *The People v. Akoffei Joseph* (1975)⁶⁶⁸ where the charge was also one of capital murder but the element of premeditation was not proved the court convicted the accused of simple murder. In that case, the accused and his wife, Elizabeth Andoshu, had an altercation. This happened when Elizabeth, on returning home on the day in question found the accused feeding the baby she had had out of an adulterous connection with a certain Martin. She taunted him by saying he was “as black as the children he had with her” and warned him to desist from ever touching with “his black and dirty hands” her baby by Martin. According to the evidence of the accused, after Elizabeth made these insults she grabbed a machete intent on attacking him with it but he seized it and delivered a fatal blow on her with it. The charge was capital murder and the defences were provocation and self-defence.

⁶⁶⁷ Suit No. HCSWP/27.c/75, unreported.

⁶⁶⁸ Charge No. HCSW/25.c/75, unreported.

Njamnsi J held that neither defence succeeded. On the other hand he was unable to agree with the prosecution that the killing was premeditated. The accused was accordingly convicted of simple murder and sentenced to life imprisonment.⁶⁶⁹

Murder by poisoning. Where poison is used to kill, the poisoning is not penalized as an autonomous offence but is considered merely as a factor aggravating the killing and thus converting it into ‘capital murder’ punishable by death. It must, of course, be shown that the poison actually caused the death. It was held in the old English case of *R. v. Gore*⁶⁷⁰ that if **A** puts poison in medicine intending that **B** should consume it and die, and **C** dies in consequence of consuming the medicine without being aware of its contents, **A** is guilty of **C**’s murder.

Poisoning is the administration in whatever way of any substance capable of causing death more or less quickly, or slowly. Administering the poison would usually be by cunning or stealth. But it may also be by force, as where a person is forcibly injected with a poisonous substance or where a person is forced to drink hemlock or to eat food laced with cyanide. If death does not occur the offender may be charged with either attempted capital murder or attempted assault, according as the appropriate mental element can be proved.

Murder in the course of committing a crime. A person is also guilty of capital murder if he intentionally causes the death of another in the course of perpetrating another offence; that is to say, “in the preparation, facilitation or commission of a felony or misdemeanour, or to enable the escape or to procure the impunity of the offender or of an accessory to such felony or misdemeanour” (section 276(1)(c)). In some jurisdictions this is known as ‘felony-murder’, generally defined as murder committed in the prosecution of an unlawful purpose. For example, a burglar kills the house guard so as to burgle the house without being caught; a murderer kills an eyewitness to the murder in order to ensure his impunity; a robber kills a pursuing policeman in order to escape.

Unintentional killing in the course of committing an offence or while escaping after having committed an offence is not indictable under section 276(1)(c) but under section 278(1).

⁶⁶⁹ See also: *The People v. Ama Chukwu* (1975), Charge No. HCSW/7.c/75, unreported. There the defence to a murder charge was also provocation by insults; *The People v. Elias Ngini* (1975), Suit No. HCSW/17.c/75, unreported, where the charge was capital murder and because the evidence pointed to the fact that the killing took place ‘in the heat of the moment’, Inglis J convicted the accused of simple murder and gave him life; and *The People v. Ngu Barnabas* (1987).

⁶⁷⁰ (1611), 9 Co. Rep. 81a.

1.1.3 Other categories of murder

Murder of ascendant (assault on ascendant). This is murder aggravated by the particularly revolting circumstance that the victim is the murderer's own parent (whether legitimate, adoptive, or natural) or legitimate grandparent or great grandparent (s.351). Like 'capital murder' this offence is punishable by death. In some jurisdictions the offence is known as 'parricide', a terminology that would seem to embrace, where appropriate, cases of 'regicide', 'femicide' and 'marricide'.

Murder of an under-15 (assault on child). Again this is also a case of murder aggravated by the fact that the victim is a person under 15 years of age (section 350). *Anyone* who intentionally causes the death of a person below 15 years of age is guilty of assault on child and liable to be punished by death. The offence does not require that the murderer be related to the victim.

Assault on woman with child, causing the child's death. By section 338, "whoever by force used against a woman with child or against a child being born causes intentionally or unintentionally the death or permanent incapacity of the child shall be punished with imprisonment for from five to ten years and with fine"⁶⁷¹.

It is thus an offence to cause, intentionally or unintentionally, the permanent incapacity of a child whether by assaulting the child's mother while the child was yet in the mother's womb or by assaulting the child itself directly when being born.

More importantly for our present purpose, it is an offence to cause the death of a child by assaulting a woman pregnant with that child. By assaulting the pregnant woman, force is indirectly applied on the child in her womb. It is also an offence to cause the death of a child by directly assaulting the child itself at the moment it was being born. In both cases the victim is the child, not its mother. The killing of a child about to or being delivered is known in some jurisdictions as 'child destruction'.

The prosecution must show that the woman was intentionally assaulted and that the death of the child in her womb was intended. Only a single charge should be laid: causing the death of a child *en ventre sa mère* by the use of force against its mother. An indictment that charges assault on the mother and death of the child would be bad for duplicity and would smack of an oppressive prosecution. For, by the doctrine of the lesser inclusive offence the charge of causing the death of a child in the womb by the use of force against its mother necessarily includes the lesser offence of assaulting the mother.

The prosecution must also show that the force was used against 'a woman with child', a coy and ancient expression for 'pregnant'. But it is not sufficient

⁶⁷¹ From 100 000 to 2 million francs.

to show merely that the woman was actually pregnant. The pregnancy may have been false or merely imaginary as in many documented cases of fibroid. She must have been pregnant with child, not with fibroid, and the pregnancy must have advanced beyond the early stages, the foetus having evolved into a child. The matter is not beyond the region of controversy. For whether or not a foetus is a child is a matter upon which neither medicine nor law, has pronounced itself definitively.

Where the charge recites that the force was used against a child being born and resulting in its death, it need not be shown that the child was actually born. When a pregnant woman enters into labour the process of the 'child being born' sets in. Complete extrusion from the mother of every part of the child is therefore not essential. So long as the child remains within the parts of the mother or connected to the mother by the umbilical cord and even if there is complete extrusion of every part of the child from the mother, the child is, in contemplation of law, 'being born'; so that any force used against the mother or directly against the child itself (e.g. deliberate throttling of the child when only its head is protruding) that results in the death of the child will fall under the mischief contemplated by section 338. The expression 'child being born' undoubtedly includes being born by Caesarean incision.

Once the umbilical cord has been severed, thus allowing the child an independent existence, causing its death thereafter cannot be prosecuted under section 338. The killing of a child after the umbilical cord has been severed can properly be prosecuted under either section 340 (infanticide) or s.350 (assault on child under the age of 15 years).

Where the charge alleges death of the child in the womb following the use of force on its mother, death is proved if it is established that the delivery of the child was a stillbirth or that the child died soon after extrusion. But where the charge alleges that force was used against a child being born and that it died in consequence thereof, it must be shown that the delivery of the child was a live birth during extrusion or that it was alive after complete extrusion. For, if the delivery was a stillbirth or if the child died soon after delivery and before the assault against it, no question of murder can possibly arise because only that which is alive can be killed.

However, where a child, born alive, afterwards dies by reason of portions or bruises received in the womb, the person who administered the portion or caused the bruise has committed the *actus reus* of murder and, depending on the time of death, may be guilty of an offence under section 338, section 340 or section 350 according as the appropriate *mens rea* can be established against him.

Where a 'qualified person' performs acts on a 'woman with child' or on a 'child being born', and kills the child it is a credible defence to a charge of 'assault on woman with child' that such was done to save the mother from

grave danger to her health (section 339(1)). In terms of that section the crime of assault on woman with child (and the crime of abortion as well) does not “apply to acts performed by a qualified person and proved necessary for the saving of the mother from grave danger to her health.” For the defence to succeed, it must be shown that *a qualified person* performed the acts and that such were *necessary* to save the mother from *grave danger* to her health.

Infanticide. Infanticide is the killing (simple murder or capital murder) of a child *within one month of birth by its mother or by any other person* (section 340). Where someone other than the mother of the child is the perpetrator of the offence, the penalty is life imprisonment in the case of infanticide-murder, and death in the case of infanticide-capital murder. But where the crime is committed by the child’s own mother, the penalty incurred is a mere imprisonment for from 5 to 10 years. This benignity of the law would seem odd and indefensible. Under the Code the killing of an ascendant aggravates what would otherwise be ordinary murder and makes it capital murder. One would therefore have thought that by parity of reasoning, killing of a descendant ought likewise to aggravate what would otherwise be ordinary murder and make it capital murder. But it is probably the case that the crime is alleviated by the controversial assumption that the pangs of birth generate some mental disturbance in the woman.

In *John Azah v. The People* (1968)⁶⁷² the critical question was whether a man can be charged with infanticide. In that case John Azah, and Margaret Akwi who was in labour and about to give birth, went to the Kumba Hospital and sought admission for Margaret as a patient. She was admitted and shortly afterwards gave birth to a baby girl while John was still there at the hospital. Four days later she was discharged and she left with her baby in the company of John Azah. On the following morning when one Freeboy Lashako went to his farm to work he discovered there an abandoned newly born baby under a tree. He informed the Police and investigations lead them to Margaret Akwi and John Azah who were then arrested. Margaret Akwi made two cautionary statements incriminating herself and John Azah. Both were in due course charged with attempted infanticide and unlawful abandonment of a child. They appeared in the High Court at Buea presided over by Endeley, J. He found them guilty on both counts and sentenced them.

They appealed to the West Cameroon Court of Appeal (Cotran, CJ, Kesiro and Dervish, JJA) holden at Buea. It was held, quashing the conviction and sentence on the infanticide count, that infanticide⁶⁷³ is an offence peculiar to a

⁶⁷² (1968-1970) UYLR 1.

⁶⁷³ The accused were charged under the Nigerian Criminal Code, a piece of legislation which at that time was in force in this country.

mother accused of killing her child so that a man can never be charged, much less be found guilty of infanticide and that, equally, no woman who is not the mother of the child can be so charged or found guilty. This decision is of course not good law under section 340 of the Penal Code as the crime of infanticide under the Penal Code is capable of being committed not only by the mother of the child but by any other person, male or female. It is submitted that the High Court decision was correct. The judgment of the Court of Appeal was an aberrant decision, wrong in terms of legal principles and social policy.

Suicide. This is the intentional destruction by a person of his own life. Sometimes called self-murder, it consists of a self-killing inspired by the deliberate intention of the deceased to put an end to his own existence. In this country, as in most others, neither suicide nor attempted suicide, nor abetting suicide, is penalized. The almost generally accepted view today is that suicide (including attempted suicide) is a manifestation of extreme mental illness demanding psychiatric care for the attempter and not imprisonment. Suicide as a crime is thus now largely of historical interest only. Moreover, in some cultures suicide is regarded as an honourable act.

History teaches that until recent times many cultures criminalized suicide. For example, until 1961 suicide was a crime under the common law of England. It was considered a felonious homicide (*felonia de se*) when the deceased was not *compos mentis* (possessed of sound mind), that is to say, he was not of sound mind. A person who committed suicide was known as a *felo de se*. The usual case was where a man intentionally took away his own life. But the crime of suicide was equally committed where a man killed himself when his intention was to kill someone else. Conversely, where a man intended to bring about his own death and fails to do so but accidentally causes the death of another person, he was guilty of murder.

If two or more persons entered a suicide pact to die together by killing each other and one of them survived, the surviving party was guilty of murder. The justification for so treating the surviving party was that "He who kills another upon his desire or command, is in the judgment of the law as much a murderer, as if he had done it merely of his own head, and the person killed is not looked upon as a *felo de se*, inasmuch as his assent was merely void, as being against the laws of God and men."⁶⁷⁴ The legal position was the same as that of the man who killed another at that other's behest. So under the old law of England, Brutus' servant committed murder when, at Brutus' entreaty, he helped Brutus kill himself. Both Brutus himself and Cassius committed the crime of murder when each took away his own life.

On the other hand, if two persons agreed to die together, each to take his

⁶⁷⁴ *Russell on Crime*, p. 560.

own life, and one of them survived, the person who died was adjudged a *felo de se* “because all that happened was originally owing to his own wicked purpose.” Supposing a husband and wife, being in extreme poverty and great distress of mind were to agree to die together and both take poison to die and the husband dies but the wife survives, the husband would, under the old common law of England, be guilty of the crime of suicide and the wife of attempted suicide.

The problem with the crime of suicide however, was that it was an offence for which the law could impose no punishment. Here the criminal law lost its main purpose, which is to deter people from committing offences. As no ordinary punishment could be inflicted on a *felo de se* an attempt was made to deter people from committing the crime. This was done by the infliction of posthumous disgrace on the suicide by a specially ignominious disposition of the corpse, or by handing over the bodies of all suicides to the surgeons to be anatomized, or by vicarious punishment of his family through the forfeiture of his property. The macabre rule that the suicide should be buried at the crossroads with a stake driven through his body was later replaced with a much less repulsive form of degradation. With time the old severities of the law ceased to be approved by the general moral sense of the public.⁶⁷⁵

Abortion. This is an offence against potential life. The protection that the law affords to human life extends to the unborn child in the womb of its mother. Paradoxically, the Code penalizes, but does not define abortion. However, the term is generally understood to mean the intentional destruction or deliberate premature bringing forth of a human foetus in such a way that it is bound to die. Some authors hold that the term has three possible meanings, namely, the killing of the live foetus in the mother’s body, the expulsion of the foetus from the mother’s womb, and the killing and then expulsion of the foetus.⁶⁷⁶ It is submitted that abortion may or may not include expulsion of the foetus, and may or may not include killing of the foetus in the mother’s body. There is thus no reason why the crime would not be held to have been committed where the foetus is expelled prematurely even though it is still alive subsequently.

Abortion is sometimes referred to as feticide (foetal killing). The terminology suggests that what is killed is not a child and that the crime is not homicide because in law foetus is not *homo*. The issue is a highly contentious one. A foetus is the unborn young of any vertebrae irrespective of age or degree of development. In many countries an infant in its mother’s womb, not being *in rerum natura*, (fully born alive) is not considered a person who can be killed within the meaning of ‘murder’. In Canada the law, as a general

⁶⁷⁵ Ibid, pp. 560-561

⁶⁷⁶ Snyman, *Criminal Law*, p. 408.

proposition, does not recognize the unborn child as having rights.⁶⁷⁷ Any legal rights of personhood can accrue only to a child born alive. However, if a child is born alive and viable the courts may recognize, for certain limited purposes, that its existence began before birth. In the eyes of English law a foetus *in utero* is an integral part of its mother until it acquires an independent existence upon birth.⁶⁷⁸ However, the relationship of foetus and mother is one of bond, not of identity, for both are two distinct organisms living symbiotically, not as a single organism with two aspects.

Notwithstanding the fact that the rights of a child *en ventre sa mère* remain contingent until live birth, the personhood of such a child is generally recognized. First, it has always been considered an offence to effect the destruction of such an unborn child. Secondly, the rights to life and to physical integrity guaranteed to all human beings extend to the protection of the unborn child. Thirdly, in the light of modern technologies like ultrasound, foetal heart monitors, foetoscopy, and micro-surgery that can now be performed on a foetus *in utero*, many jurisdictions are rethinking the qualified recognition of the unborn child as a person and bearer of rights.

At one time an ethical debate on the pros and cons of abortion went on between pro- and anti-natalists, including the churches. The debate seems to have ended inconclusively. But the debate has since taken another dimension. Women activists now canvass the view that a woman's right to control her own body includes the 'reproductive right' to choose whether or not to have children; and that if she accidentally becomes pregnant or changes her mind not to keep the baby after becoming pregnant it is her 'right' to have a safe abortion on demand and at whatever stage of the pregnancy.

The claim to any such right remains highly disputable by governments and moralists alike. But women activists argue that such a right exists as part of the 'reproductive rights' of women recognized by international human rights instruments such as the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of the Woman in Africa.

In terms of section 337, it is an offence: (i) for a woman to procure or to consent to her own abortion⁶⁷⁹; (ii) for anyone to procure the abortion of a

⁶⁷⁷ *Winnipeg Child and Family Services (NW Area) v. G (DF)* (1997) 152D.L.R. (4th) 19, Supreme Court of Canada.

⁶⁷⁸ In *Attorney General's Reference (No.3 of 1994)* [1998] A.C. 245, H.L., D stabbed V his pregnant girlfriend in the abdomen. Injury to the foetus was not detected at the time of the assault. The child was born premature and died 120 days after birth, not from the knife wound it suffered while in the womb, but from complications arising from premature birth. D was charged with murder of the child. It was held that D must be acquitted, as no conviction was possible in law.

⁶⁷⁹ The penalty for doing so is imprisonment for from 15 days to 1 year and/ or fine of from 5 000 to 200 000 francs.

woman even with her consent⁶⁸⁰; (iii) for anyone to engage habitually in abortion⁶⁸¹; and (iv) for any practitioner of the profession of medicine or an allied profession to procure the abortion of a woman even with her consent⁶⁸².

The gist of the offences under section 337 is that the woman procured (i.e., she is herself the perpetrator of the offence) or consented to her own abortion, or that the abortionist procured the woman's abortion against her will. Oddly enough, where the woman procures or consents to her own abortion, the procurement or consent operates as a mitigating factor entitling her to a much lenient punishment than the case of the abortionist who procures the abortion of a woman against her will. Yet, in law, the woman's consent to her own abortion removes her from the category of victim to that of a willing party. She becomes a co-offender and ought to be liable to a like penalty as the abortionist. This ought to be so because by allowing the deed to be performed upon herself she becomes co-responsible for the abortion.

It is noteworthy that nothing in section 337 explicitly or implicitly requires that the foetus should in fact be killed. But it will be making an ass of the law to hold that a person is not guilty of abortion where, with intent to procure the abortion of a woman, he administers her with some noxious substance thereby killing the live foetus in her womb. A woman who procures her own abortion or a party who procures her abortion whether with her consent or not, is guilty of the crime whether or not the killing of the foetus was followed by expulsion. Where the foetus is killed but not expelled from the woman's body (e.g., because the woman dies shortly after the killing of the foetus in the womb) the accused is guilty of abortion on the sufficient ground that he has arrested the continued existence and development of the foetus. In this specific example the accused would in fact have committed two crimes, abortion of the foetus and involuntary homicide of the woman, and, on principle, can properly be charged with both offences.

Legally permissible abortion. It is a defence to a charge under section 337 that the abortion is legally permissible. The law provides for two grounds of justification for abortion: grave danger to the woman's health, and pregnancy resulting from rape. The defence of abortion on therapeutic grounds is provided by s.339 (1). By that provision abortion is justified if "performed by a qualified person and proved necessary for the saving of the mother from grave danger to her health."

⁶⁸⁰ The penalty for this offence is imprisonment for from 1 to 5 years and a fine of from 100 000 to 2 million francs.

⁶⁸¹ The penalty is imprisonment for from 2 to 10 years and a fine of from 200 000 to 4 million francs.

⁶⁸² The penalty is imprisonment for from 2 to 10 years, and a fine of from 200 000 to 4 million francs. In addition the court may also order closure of the professional premises and impose a ban on the practitioner exercising his occupation as provided under sections 34 and 36.

(i) *Abortion on medical grounds.* The defence is available to any ‘qualified person’ and not just to the specialist in ‘obs & gyn’, that is, the obstetrician/gynaecologist. Thus, it is an absolute defence for any medical practitioner to plead that the abortion was performed as a matter of necessity to save the mother from grave danger to her health. The operative word here is ‘health’. Saving health is wider than saving life. The term embraces both mental and physical health and necessarily includes the risk of death.

In the English case of *R. v. Bourne*⁶⁸³, Macnaghten J said:

“It is not contended that those words [‘for the purpose of preserving the life of the mother’] mean merely for the purpose of saving the mother from instant death. There are cases, we are told, where it is reasonably certain that a pregnant woman will not be able to deliver the child which is in her womb and survive. In such a case where the doctor anticipates, basing his opinion upon the experience of the profession, that the child cannot be delivered without the death of the mother it is obvious that the sooner the operation is performed the better. The law does not require the doctor to wait until the unfortunate woman is in peril of immediate death. In such a case he is not only entitled, but it is his duty to perform the operation with a view to saving her life. ... If the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in the honest belief, operates is operating for the purpose of preserving the life of the mother.”

It would seem therefore that the defence under section 339 (1) would succeed where the continuation of the pregnancy will gravely imperil the mother’s mental or physical health, including the risk of death (e.g., risk of a dangerous breech birth or Caesarean section). But it does not seem that the defence would succeed where it is pleaded that the abortion was necessary because of a serious risk that the child to be born would suffer from physical and mental defect of such a nature that he will be irreparably seriously handicapped. The defence exists because on balance it is thought expedient to save the mother than a foetus. Besides, such a plea will most likely fail on policy grounds as accepting it might be construed as licensing abortions on a supposedly possible handicap of the child. But *quare* where it is shown that the child, if born handicapped would pose a grave danger to the mother’s health.

(ii) *Abortion on the ground of pregnancy resulting from rape.* Section 339(2) authorises abortion where it can be shown that the foetus was conceived in consequence of rape. The rationale for this offence appears to be that the pregnancy was

⁶⁸³ [1939] 1 K.B.687.

not consented to and so will be disgraceful and something of a mental torture to carry an unwanted pregnancy. If this is correct then the term 'rape' must be interpreted to include incestuous rape, marital rape, and a pregnancy resulting from intercourse with an HIV infected man who knew of his HIV-positive status but failed to disclose it to the woman before the act of sexual intercourse.

The defence under section 339 (2) is available only to 'a qualified medical practitioner'. And the abortion must have been performed only after having obtained the certificate of the state prosecutor that indeed the woman had been raped. This is odd because the most the prosecutor can certify is that there has been an allegation of rape. A woman may claim, truthfully or falsely, that she was raped. But whether or not legally she was raped (and this is a legal, not a medical, issue) is a determination that can properly be made only by the court. However, whether the woman is in fact pregnant and whether that pregnancy resulted from a particular rape are medical questions.

Abortion is a result-crime. Whatever is used as abortifacient is immaterial: food, liquid, strenuous exercise, drug, force, manipulation, the administration of poison or other noxious thing, the use of any instrument or force of any kind, or the use of any other means whatever. The particular drug used by the offender to achieve his purpose need not be an abortifacient in nature, that is to say, a drug that in itself causes abortion. In the law of abortion any herb, substance or chemical compound, mixture or concoction administered with a view to procure abortion is a drug. Thus any benign medicine may become noxious in its nature and capable of inducing an abortion according to the form, quantity, quality or frequency with which it is administered, or according to its combination with some other medicine or substance.

Attempt in abortion. The commission of the crime of abortion presupposes that the woman is pregnant. If the woman was in fact not pregnant and the offender thought she was and intended to procure her abortion, he is guilty of attempt. It is no apology for the offender to aver that the means he used did not and could not induce a miscarriage. If the abortionist intended to abort, he is guilty of attempted abortion if he uses the wrong or insufficient means to procure the abortion. By the same token, where a woman, being with child, with intent to procure abortion takes a thing which she believes to be noxious but which is, in fact, harmless, she will be guilty of attempted abortion. The law is the same where the abortionist aborts a dead foetus while labouring under the impression that the foetus was alive.

The problem of euthanasia. The cases that often give rise to euthanasia are those in which a person is severely handicapped or is afflicted by a chronic incurable illness or is terminally ill or has been on a ventilator for months or

years (a 'vegetable'). The patient then requests (or a relative then decides) that the life be terminated to put an end to the suffering. In almost all countries of the world, and apparently in this one, the law does not permit a person to consent to being murdered or to decide that suicide is the way out of his suffering and then to get someone to assist him in the suicide. Neither is euthanasia or 'mercy-killing' a ground of justification or excuse. Therefore, if a person kills another upon his desire or command, he is in the judgment of the law as much a murderer as if he had done it without the victim's consent.

It follows that consent by a person to the causing of his own death does not affect the criminal responsibility of any person who causes such death. The reason is that a person who kills another on so-called grounds of 'mercy' intentionally kills. His only 'defence' is that the victim himself commanded an end to be put to his own life and that the request was acceded to out of 'compassion'. But such a command is manifestly unlawful in the eyes of the law and compassion can never be a justification for committing an offence. However, a court may well be inclined to consider the victim's consent to the taking away of his life as a factor affecting criminal responsibility so as to mitigate sentence.

In 2003 the Dutch Government passed a controversial law legalizing mercy killing. The law grants immunity from criminal prosecution for doctors, provided they follow strict guidelines. It makes incurably ill children as young as 12 years of age eligible for euthanasia, if the parents agree. In exceptional cases, a doctor may perform euthanasia without parental consent if the doctor is convinced this would prevent serious detriment to the patient. The law recognizes the validity of written requests to die. The Netherlands has recently been toying with the idea of extending euthanasia to babies with learning disabilities. Many view developments such as these with grave misgivings.

Attention is drawn to section 287 which provides as follows: "The infliction of harm and the use of force shall constitute no offence where proved to be justified by the immediate necessity of avoiding greater harm to the victim." Can this provision be invoked in a valiant attempt to shore up an argument that the section is wide enough to accommodate euthanasia?

The first objection to such a contention is that the section does not in terms refer to killing, though it is possible to read that term in the expression 'harm and the use of force'. Secondly, the section talks of 'avoiding greater harm to the victim'. The classic situation envisioned by the section is obviously that in which a body part is amputated or an organ removed to save the victim from death. Death appears to be the greatest of harm ever and the doctor's ministrations on a patient seeks to avoid preventable death. But it is the argument of the 'mercy' killer that in certain cases prolonged suffering or agony is a greater harm to be alleviated by death, which in the circumstances ought to be considered merciful and a lesser harm to the sufferer.

Perhaps even more relevant to the question of euthanasia is section 286. That section provides that the crime of assault occasioning death (as well as assault occasioning grievous harm, simple harm, and slight harm) “shall not apply to *the professional services of any person duly authorized to render them*, where performed with the consent either of the patient or of such person as may have custody of him: Provided that where the patient is incapable of consent his spouse may consent on his behalf, and where communication with the said spouse or person having custody is impossible without risk to the patient, consent shall not be necessary.”

The devil, they say, is in the details. The details here are in the words in italics. On the face of it section 286 provides a defence for say a physician who carries out a ‘mercy killing’. In reality it provides no such defence. No law duly authorizes any professional to carry out ‘mercy killings’ as part of his professional services. Prior to beginning medical practice doctors take the Hippocratic oath affirming their obligation and proper conduct to alleviate human illness. Their professional calling does not demand of them to kill, however laudable the motive for killing might seem to be.

In England, a contentious private member’s bill was introduced by Lord Joffe in the House of Lords in May 2006 but was derailed.⁶⁸⁴ The Bill was called the Assisted Dying for the Terminally Ill. Proponents of the Bill argued that the Bill simply offered terminally ill people the chance to die with dignity at a time of their choosing, that a caring society cannot sit back and complacently accept that terminally ill patients suffering unbearably should just continue to suffer for the good of society as a whole until a so-called natural death, and that a solution must be found to the unbearable suffering of patients whose needs cannot be met by palliative care. But opponents of the Bill counter-argued that the Bill would demolish fundamental principles about the sanctity of life, that the security of the vulnerable would be jeopardized by radically changing the relationship between patient and physician, that it is not possible to predict how people may feel about the future and that to take that view is ultimately the most presumptuous thing that can be done by lawmakers. Many commentators doubt that Lord Joffe’s Bill or any such bill will ever become law in England any time soon.

1.2. Unintentional killing: Negligent or Reckless Killing

The unintentional killing of a person by another occurs where a man causes another’s death without intending to do so but purely by misfortune.⁶⁸⁵ The

⁶⁸⁴ *The Daily Telegraph*, Saturday, May 13, 2006, p. 10.

⁶⁸⁵ One kind of homicide known under ancient English common law was homicide *per infortunium simplex* (homicide by mere accident or misfortune), that is to say, homicide where no man took part in the killing, e.g., a man dies as a result of falling from a horse, a tree, the roof

misfortune may be the result of negligence on the part of the killer or the result of some other blameworthy state of mind on his part (lack of due skill, carelessness, rashness, or disregard of regulation). Examples are where a poacher enters a game park and shoots at an animal with intent to steal it, and the bullet ricochets and kills a game ranger who happens to be nearby; where any act known to be dangerous to life, and likely in itself to cause death is done for the purpose of committing a felony which caused death; where a man intending to commit rape upon a woman but without the least wish to kill her, squeezes her by the throat to overpower her, and in so doing kills her.

It follows that when a person begins doing wicked acts for his own base purpose, he risks the life of others and his own freedom. If a person chooses, for some wicked purpose of his own to sink a boat at sea or in the Victoria Deep Sea Port or to set a building on fire, it matters nothing whether at the time of committing the act he hoped that the people in the boat will be picked up by a passing vessel or otherwise rescued or that the people in the building will be saved by the fire brigade.

In all cases of unintentional killing it is the death of the victim that is unintended not the conduct of the killer. The killer either recklessly engages in or intends the conduct resulting in the victim's death. An example would include even the sort of case where a man slightly assaults another such as pushing him with an intention of merely stealing from him and the person so assaulted, having a weak heart, or some other internal disorder, dies.

Two situations of unlawful killing may thus be distinguished.

1.2.1 Cases of intentional conduct resulting in unintended death

If a person intentionally assaults or hurts another not intending to kill him but death nevertheless ensues he is guilty of unintentional killing (involuntary homicide) and liable to a very long term of imprisonment. A number of specific offences fall under this head.

Assault occasioning death. The unintentional causing of another's death by the intentional use of force or interference is an offence under section 278 (1) punishable by imprisonment for from 6 to 20 years. If A intentionally hits B not intending to kill him but B nevertheless dies following the assault, A is guilty of assault occasioning death. If a spouse batters the other or beats up a child of the family, not intending to kill, and the battered spouse or child dies, the batterer is guilty of assault occasioning death; and it will be an idle defence to argue that the assault was not such as would ordinarily cause death. In law the assailant takes his victim as he finds him.

of a house, or into a pit, or something falls on him and he dies, or he is killed by a beast, or is struck dead by lightning, or is electrocuted by touching a live electric wire. The criminal law is obviously not concerned with this kind of homicide.

If an arrestee, in order to escape, assaults, without any intention to kill, a person who has lawfully arrested him, and that person dies in consequence of the assault, the arrestee is guilty of assault occasioning death, not murder. In *William Ngafor v. The People* the appellant and X conspired to steal and did steal some property belonging to Y against whom X had a grievance. X was arrested and he made a statement in which he narrated the part played by the appellant in the theft. It was thereupon decided that the deceased, who was a policeman, would accompany X, dressed in mufti, to appellant's place, disguised as a prospective buyer of the stolen articles. Appellant was contacted and the deceased was introduced to him as a prospective buyer. Appellant demanded 10 000 francs for the stolen items, which the deceased agreed to pay. When the deceased asked to see the goods appellant told him to return the following day at 6 p.m.

The three men then decided to go and have a drink. On the way the deceased expressed his fears to X that appellant might discover his true identity. There and there he proceeded to arrest the appellant who then assaulted him in an attempt to escape. In the scuffle that ensued, the deceased held to the appellant who thrust his head between the legs of the deceased, lifted him up on his shoulders and heaved him over. The deceased fell on his head with face downwards and died almost immediately. A postmortem examination revealed that death was due to the fracture and dislocation of the 3rd cervical spine resulting in fatal injury to the spinal cord.

The appellant was arrested and charged with capital murder contrary to section 276(1)(c). Endeley, J found him guilty of the offence but gave him life imprisonment instead of the mandatory death penalty on the finding that the appellant did not use any lethal weapon in the perpetration of the offence and that the force used was not such as would ordinarily be expected to cause death. The Appeal Court found that from the evidence the appellant did not intend to kill the deceased and that the unfortunate death of the deceased would ordinarily bring the case under section 278(1). But their Lordships hastened to add that the assault, which caused the death having been committed on a public servant, the offence really fell under section 156(4). In the result, the appeal was allowed and the conviction and sentenced under section 276 1)(c) quashed; but the appellant was found guilty under section 156(4) and sentenced to 7 years' imprisonment after taking into account the mitigating circumstances as correctly found by the learned trial Judge.

The crime of 'assault occasioning death' may be committed by the intentional use of actual force against the victim. It may also be committed by the intentional use of what the Code denotes in section 285 as 'constructive force'. In terms of that section the words 'force' and 'interference' for the purpose of the Code include: the administration of any substance harmful to health; desertion under section 282; and deprivation of nourishment or care, to

a degree endangering health, by a person having custody in law or in fact of another who is either incapable of withdrawing himself from the said custody or incapable of providing for himself.

Supposing that **A** were to remove a severely handicapped child and to abandon him at a spot where he hopes the child will be spotted and taken into care by Sisters of the Mother Theresa Orphanage, but the child dies as a result of the abandonment. **A** can properly be convicted under section 278(1). Mama Moses put baby Moses in a basket among the bulrushes at the edge of the River Nile hoping that Pharaoh's daughter who came to the river to take a bath would find him. If Moses had not been spotted and taken by Pharaoh's daughter and had died of the abandonment the crime of assault occasioning death would thereby have been committed by Mama Moses. By section 285(b) constructive force is assigned to the meaning of 'desertion' under section 282.

Similarly, **A** can be convicted of an offence under section 278(1) if though not intending **B**'s death nevertheless intentionally administers to **B** any substance harmful to health and **B** as a result dies. Also, if a guardian without any intention to kill nevertheless deprives his hapless ward of nourishment or care to a degree endangering health and the ward dies in consequence of the food deprivation, the guardian is guilty of assault occasioning death under section 278(1). In these cases, the law treats the administration of the harmful substance, the desertion (i.e. removal and abandonment), and the deprivation of nourishment or care, as interference or as the use of force.

Where an assailant frightens his victim who, in trying to escape from an apprehended attack, does something which results in his death, the courts are willing to hold the assailant guilty of assault occasioning death on the reasoning that there was constructive force or that there was indirect use of force.⁶⁸⁶ In *Otto Enow v. The People* (1968)⁶⁸⁷ an appeal was taken out against the judgment of Endeley, J in the High Court at Buea, in which the appellant was found guilty and convicted of the murder of one Thompson Upke. The

⁶⁸⁶ It is settled law that in assault, force is inflicted not only when it is applied directly (hitting the victim with a fist or an object) but also when it is applied indirectly as where the victim falls into a hole dug by the accused, or where he is hit by a bucket of water placed by the accused on top of a door as a 'booby trap', or where the accused causes a theatre or cinema audience to panic and rush down an unlit staircase whose exit door he has locked and against which those at the front of the crowd are injured. There can thus be an assault causing death or other bodily harm without an assault: *R. v. Wilson* [1983] 3 All E.R. 448. In the Australian case of *Salisbury* [1976] VR 452, 76 Cr App Rep 261n, the Supreme Court of Victoria held that grievous bodily harm may be inflicted either where the accused has directly and violently inflicted it by assaulting the victim, or where the accused has inflicted it by doing something intentionally (i.e. deliberately), which, though it is not itself a direct application of force to the body of the victim, does directly result in force being applied violently to the body of the victim, so that he suffers grievous bodily harm.

⁶⁸⁷ (1968-1970) UYLR 3.

appellant and the deceased lived in the village of Mpundu near Muyuka, where the appellant owned a farm on the banks of the River Mungo. One morning he and his three wives went to his farm to work. Sometime during that morning **A**, **B** and the deceased, were returning in their canoe from Muyuka where they had gone to buy two bags of sugar. As they were passing the farm of the appellant they saw him and his three wives there. They also noticed that there was a canoe berthed by the corner of the farm. They continued on their way towards Mpundu beach, but some minutes later they noticed that the appellant was following them in the canoe they had seen by the corner of the farm. They finally reached Mpundu beach and disembarked.

A few minutes later the appellant arrived at the beach and disembarked also, carrying a machete in his hand. The appellant proceeded to a spot behind the deceased and **B**, who were standing side by side facing the river. The appellant raised his machete to deliver a blow at them. **A**, who was standing a few yards away, saw what the appellant was about to do and he at once shouted words to the effect that appellant should hold on. Thereupon **B** and the deceased looked back and on seeing the appellant there with the machete raised against them, they both jumped into the river to save their lives. **A** ran to the village and raised an alarm. **B** swam to the bank opposite and, according to his evidence, he saw appellant take his own canoe, follow the deceased with it and strike the deceased three blows with a machete. The deceased went under the water. When news of the incident got to the village a search party was sent to the beach. The party combed the immediate vicinity but found nothing. Three days later, the body of the deceased was found floating down the river near a farm at Mabeta. The postmortem examination revealed that the cause of death was drowning, that the skull was normal, and that the body had no external injuries, wounds or lacerations.

At the trial of the appellant the prosecution advanced, as the motive for the killing, the fact that the deceased had committed adultery with one of the wives of the appellant. The defence that was put forward was one of *alibi*. According to appellant he and his three wives worked at his farm until they were tired and then returned home. He never saw the deceased go past his farm in a canoe. He never followed him in another canoe and knew nothing about the killing. The trial Judge found the appellant and his three wives to be shameless and deliberate liars, disbelieved the defence of *alibi* put forward by the appellant and found him guilty of murder as charged. The appeal boiled down to the fact that the trial court overlooked serious conflicts in the evidence of the prosecution witnesses. There were discrepancies in the evidence given by **B** that the killing was by machete blows delivered on the head of the deceased by appellant, and the evidence of the medical doctor that the cause of death was drowning and that there were no injuries, wounds or lacerations on the head or body of the deceased.

Given these discrepancies the Appellate Court was of the opinion that the trial court should have treated the evidence of **B** with the utmost reserve and suspicion. While agreeing with the finding of the trial court that the appellant followed the deceased in a canoe armed with a machete, the learned Justices of Appeal were of the opinion that in the absence of any other satisfactory evidence, they could not conclude that appellant's aim in following the deceased was either to kill the deceased or to cause him some serious bodily injury. Their Lordships opined that they could not rule out the possibility that appellant merely wanted to frighten the deceased so that he should leave his wife alone. Considering all the circumstances of the case their Lordships concluded that the deceased jumped into the river to escape from a blow he believed the appellant was about to deliver to him, and in his attempt to make good his escape he was drowned. It was accordingly held that the conduct of the appellant amounted to manslaughter (i.e. assault occasioning death) only. In the result the appeal was allowed and a verdict of guilty of 'manslaughter' was substituted for that of murder.

Death in the course of witchcraft practice. Since the law does not believe in wizardry it cannot make practice of witchcraft an offence. The wizard or witch may thus practice his/her occult craft without the law's interference; provided the practice of that craft is not such as liable to cause a breach of the public peace or does not result in death. A person is guilty of an offence under section 278(2) and liable to imprisonment for life if he unintentionally causes the death of another by the intentional use of force or interference against that person in the course of any act of witchcraft, magic or divination. 'Act of witchcraft, magic or divination' suggests some conduct involving a degree of formality. An angry curse uttered by a person in the course of a quarrel is therefore not witchcraft or magic. But if **A** prepares and gives **B** some supposedly magic potion to drink as a protection against his perceived enemies and **B** dies after drinking the potion, **A** can properly be charged with causing death in the course of witchcraft.

Death caused by arson. Whoever intentionally sets fire to a dwelling, a vehicle or a working mine, as provided in section 227(1), and thereby unintentionally causes the death of another is guilty of causing death by arson and liable to imprisonment for life.⁶⁸⁸

Death caused by destruction of property. A person is also liable to imprisonment for life if convicted of intentionally destroying a dwelling, vehicle or working mine and thereby unintentionally causing the death of another.

⁶⁸⁸ *The People v. Susana Mbongteh & George Fongoh* (1987).

1.2.2 Cases of reckless conduct resulting in unintended death

Here the unintended death could have been avoided had the killer's conduct not been careless, rash or reckless. The killer did not intend the death to happen or did not foresee it or if he did, he decided to tempt fate; but the death nevertheless ensued as a result of his reckless conduct. This may occur in either of two circumstances: where a man, when engaged in no unlawful act causes death to another by pure accident but there is in his conduct some blameworthy (culpable) state of mind such as negligence, carelessness, or rashness; and where a man kills another in the course of an unlawful conduct which involves the risk of harm to another.

Killing by reckless conduct. Generally, this is unintended death by reckless conduct. By section 289(1), anyone who by lack of due skill, carelessness, rashness or disregard of regulation causes another's death is guilty of an offence punishable by imprisonment for from 3 months to 5 years and/or a fine⁶⁸⁹. If a man throws a stone at a bird perching on a tree (which is not an unlawful conduct) in a yard with people around, and the stone strikes and kills another to whom he intended no harm he is guilty of recklessly causing another's death just as if he had thrown a stone to shatter the windscreen of a passing motor car (an unlawful conduct), and the stone hits and kills a bystander. In both cases the stone thrower's conduct is reckless.

The physical element of this offence is the particular conduct involving risk to others, while the fault element (culpability) is either of the states of mind mentioned, i.e., lack of due skill, carelessness, rashness, or disregard of regulation. The term 'recklessness', though not used in the Code, adequately translates these culpable states of mind. A person is *reckless* when he realises the probability of a consequence and chances his arm. He is aware or foresees the possibility of the consequence and yet still acts. Recklessness is therefore advertent or gross negligence. The person who acts in disregard of regulations, the person who acts when he lacks due skill to do so, the person who acts rashly, the person who acts carelessly, is a person who is aware of or foresees the possibility of the consequence of his act but decides to tempt fate, hoping that the foreseen consequence will not occur. Such a person acts recklessly.

Death by medical recklessness. An important aspect of unintentional killing by recklessness concerns members of the medical profession. Generally the law imposes a duty upon any member of the medical profession who undertakes to administer surgical or medical treatment to any other person, to have reasonable skill and to use reasonable care in doing so. If he acts consistently with that standard any unintentional death occurring in the normal

⁶⁸⁹ From 10 000 to 500 000 francs

course of medical treatment does not constitute an offence. In terms of section 286 the crime of assault occasioning death does not apply to the professional services of any person duly authorized to render them, and performed with the consent of the patient or of such person, as may have custody over him.

A doctor who negligently causes a patient's death is not guilty of unintentional killing unless his negligence or incompetence is so great as to show a disregard for life and safety and to amount to recklessness, which is also denoted as gross negligence. In *Adomako*⁶⁹⁰, D was the anaesthetist during an eye operation. A disconnection occurred in a tube enabling the patient to breathe by mechanical means, which D failed to notice or remedy. As a result the supply of oxygen to the patient ceased and nine minutes later the patient had a cardiac arrest and died. Four and a half minutes after the disconnection, an alarm sounded on the machine monitoring the patient's blood pressure. D checked the equipment and administered atropine, but at no stage before the cardiac arrest did he check the tube connection.

At D's trial for manslaughter, at which two expert witnesses had described D's conduct as 'abysmal' and as a 'gross dereliction of duty', the judge directed the jury that the test to be applied was whether D was guilty of gross negligence. The jury convicted D, who appealed on the ground that the judge had been wrong so to direct the jury. The Court of Appeal dismissed the appeal, and so did the House of Lords, on the ground that a direction in terms of gross negligence had been the appropriate direction.

When an unqualified or an unlicensed person undertakes a surgical operation or other medical treatment the law requires him to possess the requisite skill and to use it. If he does not, he is guilty of criminal recklessness (lack of due skill). If the evidence shows that the person though unlicensed, possesses the requisite skill and performed the operation skillfully, he is not guilty of unintentional killing simply because he is an unlicensed practitioner. In every case reckless conduct must be proved.

Death by reckless use of fire. The unintentional killing of another by rashly making use of fire, or of any inflammable or explosive matter, or of electricity, or of any machinery is an offence and carries a penalty of imprisonment for life⁶⁹¹. Although death is unintended the penalty is the same as that for the intentional causing of another's death (murder) because of the very high risk to life that the use of those elements involves and the indifference and recklessness shown by D's conduct

⁶⁹⁰ [1994] 3 All E. R. 79, HL.

⁶⁹¹ Section 228(2)(a) read with section 289(3).

Death by reckless demolition of any structure. The unintentional killing of another by rashly demolishing in whole or in part any construction or any uninhabited building is also an offence and the penalty is also imprisonment for life⁶⁹². The penalty of life imprisonment here is justifiable on the same grounds as for the life penalty for the preceding offence.

Death by automobile or vehicular recklessness. The driver of any vehicle who by his recklessness unintentionally kills another person is punishable by imprisonment for from 3 months to 5 years and/or a fine⁶⁹³. The penalty becomes imprisonment for from 6 months to 10 years and/or a fine⁶⁹⁴ where the killer driver (i) was drunk or drugged when driving; or (ii) was not licensed to drive the vehicle in question; or (iii) departed from the scene of the accident before being identified, with intent to avoid his liability.

It has long been recognized that it is the duty of every man who drives a vehicle on the public highway to drive it with such care and caution as to prevent, as far as is in his power, any injury to any person. The case *Keju Tanyi Simon v The People* (2005)⁶⁹⁵ is instructive. On the 28th of December 2003 Mrs. Gladys Daiga Gang was driving from Bamenda to Bali. She was in the car with three of her children, Donald Dobgima Gang, George Fon Daiga Gang and Thiery Soja Gang. At a stretch of road at a place called Worsing there was a head on collision between the car being driven by Mrs. Gang and a vehicle from the opposite end being driven by one Simon Keju Tanyi, the appellant. The collision was so severe that it resulted in three deaths, Mrs. Gang instantly and two of her children, Donald and George, later in hospital. Thiery sustained multiple fractures and injuries, but otherwise survived the gruesome accident. The Appellant also survived the accident, departed from the scene of the accident and appears to have been admitted in hospital and discharged. He only availed himself to the gendarmerie authorities eleven days later.

Investigations into the accident were carried and ended in a six count charge being preferred against the Appellant. The charge recited that the Appellant “being the driver of vehicle No. SW 3649 D, without due care and attention, that would be expected of a reasonable, prudent and competent driver, on the public highway, recklessly left his own side of the road on the Bamenda-Bali highway and at a place called Worsing, collided with car No. NW 3789 D, which at the time was driven by Mrs. Gang Gladys Daiga in company of her three sons ...” The Appellant was accordingly charged under sections 228(2)(d) (dangerous activities through rash driving), 289(1) (unintentional killing through reckless driving), 280 (simple harm) as read with

⁶⁹² Section 288(2)(b) read with section 289(3).

⁶⁹³ From 10 000 to 500 000 francs. See *The People v. Joseph Eyang* (1968) W.C.L.R. 39.

⁶⁹⁴ From 20 000 to 1 million francs.

⁶⁹⁵ Appeal No. BCA/MS/21C/2004, unreported.

section 289(1), and section 290(1)(c) (departing, with intent to avoid his liability, from the scene of the accident before being identified). Appellant pleaded guilty to all the charges except for the last one. The Bamenda Court of First Instance convicted him of all the offences and sentenced him accordingly. He appealed to the Bamenda Court of Appeal (Morfaw, CJ, President; Njilele, Wacka, JJA, Vice Presidents) on the ground that he had been wrongly convicted on the last count. Since the appellant did not contest his conviction and sentence on the other counts, the appeal was argued and decided only on the point whether the appellant had, with intent to avoid his liability, left the scene of the accident before being identified.

Held (Morfaw, CJ, delivering the judgment of the Court) dismissing the appeal,

“(1) that in cases of ghastly road accidents, such as the one under consideration, the appellant may not necessarily be obliged to remain or stay at the scene of the accident for purposes of identification before departure, for the simple reason that he could be lynched by an uncontrollable angry crowd or mob. What is of prime or cardinal importance is the analysis or appraisal of evidence by the trial court relating to the conduct, and or attitude of the appellant after his departure from the scene of the accident. In other words, is there evidence to prove or disprove that the appellant behaved as a reasonable man and within a reasonable time limit as one who was willing to give himself up to the forces of law and order for the purpose of identification, in order to face the law and *prove his innocence*? (2) that though there is evidence on record that the appellant sent his National Identity Card through his wife to the Bali Gendarmerie Brigade, we are of the view that it was unjustifiably too long a period after the accident. From the above, and considering that the appellant never voluntarily reported himself to the competent Gendarmerie Brigade, we hold the view that the prosecution discharged the burden under the relevant section of the law.”

The words in italics must be considered unfortunate. Under the common law system, trans-located here as a result British colonization, the presumption of innocence is a key principle of the criminal justice system, such that it is always for the prosecution to prove the guilt of the accused and never for the accused to prove his innocence.

The driver of a car with defective steering and useless brakes is guilty of unintentional killing by recklessness if without any apparent reason his car mounts a pavement or sidewalk and kills a child. The conduct of a person in driving a vehicle in that sort of condition is a highly dangerous behaviour and betrays a reckless disregard for the life and safety of other road users. A pedestrian, even if he be a child or an infirm from disease, has a right to walk on the public highway (and this includes the sidewalk) and he is entitled to the exercise of reasonable care on the part of persons driving motor vehicles.

Driving at an excessive speed on a busy thoroughfare is criminal disregard

for the life and safety of others. Driving fast and zigzagging along the road in a built-up area when pedestrians and other vehicles are about is also a criminal disregard for the life and safety of other road users. In fact such conduct is in itself a criminal offence. It is punishable not because it has produced any actual results or caused the untoward consequence that it portends. The harmfulness of the conduct does not rest upon any actual results, but upon its tendency to cause the injuries to be prevented.

However, merely to go over the middle line of the road a few centimetres while leaving a wide margin for on-coming cars does not constitute recklessness. But, in the night, to do that and at the same time blind the driver of an approaching car with headlights at full beam constitute a reckless disregard for the safety of other road users.

No attempt or conspiracy. A person cannot ‘intend’ to be ‘unintentional’, and since intention is required in an attempt or conspiracy to commit a crime there can be no attempt or conspiracy to commit unintentional killing.

§2. Lawful Homicide

It is not every killing of a human being that is unlawful. Homicide is unlawful only if it occurs under such circumstances as the law seeks to prevent. A killing that is authorized or justified or excused by law is not unlawful.

2.1. Justifiable homicide

Justifiable homicide may be occasioned by the performance of acts *required by law*, or done by the *permission of the law*. If a killing can be legally justified there is no criminal liability, and therefore the question of *mens rea* is irrelevant. All that has to be decided is whether it was or was not unlawful to have caused the death. It is a principle in all legal systems that what the law requires it justifies: *quando aliquid mandatur, mandatur et omne per quod per venit ad illud*.⁶⁹⁶

It follows that no act or omission in execution of the law or authorized by law, and performed in accordance with the conditions prescribed by law, constitutes an offence. It is so provided in s.76 of the Penal Code. Common examples are cases where the law authorizes entry into dwellings; search and seizure; use of force (including deadly force in some cases) by an officer of the law, or by the master of a vessel in the discharge of his duty to preserve order on board, or the citizen preventing a felon’s escape, or an officer in the suppression of a riot. Such acts are not only lawful, but are commanded by the law itself.

⁶⁹⁶ Literally, ‘when anything is authorised, everything by which it can be achieved is also authorised’.

Execution of criminals. The execution of criminals under a lawful sentence of death is an act required by the law, and therefore justifiable. Since all acts of official duty should, in the nature of their execution, be in conformity with the judgment by which they are directed, in the execution of the death penalty, the execution ought not to vary from the judgment. If it does, the executioner will be guilty of murder. Thus, if the judgment is for hanging, and the hangman beheaded or garroted the condemned man, it is murder. Similarly, if an officer, whose duty it is to execute a sentence of whipping (where such sentence is still lawful), exceeds all bounds of moderation, and thereby causes the party's death, he would be guilty of the type of unintentional killing known as assault occasioning death.

Section 22 of the Penal Code lays down the conditions precedent to execution of a condemned prisoner and s.23 states how an execution is to be carried out. By section 22 every sentence of death must be submitted to the republican President for his decision on commutation. No death sentence may be executed until he shall have signified his decision not to commute. No woman with child may be executed until after her delivery. And no execution may take place on Sunday or on a public holiday. Section 23 provides that execution of the death sentence shall be by *shooting* or by *hanging*, and shall be public unless otherwise ordered by the decision not to commute. When the court passes sentence of death it must therefore specify the manner of execution. The body of any person executed must be returned to his family at its request, but on condition of a quiet funeral.

Deadly force by officer of the law in trying to make an arrest. Among the acts done by the permission of the law, for the advancement of public justice, may be reckoned those of the officer, who, in execution of his office kills the person who assaults or resists him. The general ground of justification here is lawful defence under s.84. But specific legislation empowers an officer engaged in the lawful execution of any sentence, process or warrant, or in making any arrest, and for any person lawfully assisting him, to use such force as may be reasonably necessary to overcome any force used in resisting such execution or arrest, or to prevent the escape or rescue of the person arrested, or to prevent the commission of an offence.⁶⁹⁷ It would appear that under the terms of these powers it may even be justifiable to kill the person resisting if that is reasonably necessary in order to overcome the force used. In such circumstances homicide is justifiable not merely on the principle of lawful defence under section 84 but on the principle and the necessity of executing the duty the law imposes on citizens in the interest of peace and order in the community.

If an officer of the law proceeds to make a lawful arrest and he is assaulted

⁶⁹⁷ See Schedule III (B), sections 63-70

or resisted, the nature and character of the assault or resistance may be such as will justify the officer in proceeding to the last extremity. The officer is entitled to repel force with force, and need not give back. If the party making resistance is killed in the struggle, the homicide will be justifiable. This rule is founded in reason and public utility. For few men would quietly submit to an arrest, if, in every case of resistance, the party empowered to arrest were obliged to desist, and leave the business undone.

However, the party who proceeds to make an illegal arrest commits a provocation and the illegality of his attempt puts him on the same footing as any other wrongdoer. Use of deadly force, under these circumstances, by the officer would make the killing murder.

Killing in lawful defence of self or of another person. In terms of s.84 everyone has the right to defend not only his person and any right of himself, but also the person and rights of others, against an unlawful infringement, provided the conditions of proportionality, and of immediacy and necessity, are met. A man acting in lawful defence may, depending on the nature of the unlawful attack, go as far as killing his assailant. The law lays it down that intentional killing shall be proportionate to an attack causing a reasonable apprehension of death, of grievous bodily harm, of rape, or of sodomy (section 84(2)). One reason why homicide in lawful defence is justifiable is that where, for example, a crime, which in itself is capital, is endeavoured to be committed, it is lawful to repel that unprovoked physical attack by the death of the aggressor.

A man is thus justified in resisting by force (including deadly force if necessary) anyone who manifestly intends and endeavours by violence or surprise to commit an offence against either his person or right, or the person or right of another. There is no obligation that the person attacked should retreat as far as possible before retaliating because to do so would be to give up the protection of his person or his right to his adversary by his flight. While the law does not demand heroism, it also does not encourage cowardice. Accordingly, the person is perfectly entitled to resist the attack where he stands and may indeed pursue his adversary until the danger is ended. But if the apprehension of danger has ceased, killing then will be murder.

The rule that an aggression may be resisted by deadly force does not apply if the deadly force was disproportionate to the attack, as where the attack was unaccompanied with force, for example, pocket picking. If **A** makes an attack on **B**, it must plainly appear by the manner of the assault, the weapon, etc. that the life of **B** is in imminent danger or at least that there was reasonable apprehension of grievous harm being caused to **B**; otherwise **B**'s killing of **A** will not be justifiable self-defence. There must be an intention on the part of the person killed to murder, to cause some serious bodily injury or some

grievous sexual assault such as rape or sodomy. If two or more people attack an individual at once with intent to kill him or cause him grievous bodily harm, he is entitled to kill any of his assailants in his own defence; because so unequal an attack resembles more a desire of assassination than of combat.

Lawful defence permits a person to interpose to prevent deadly mischief to another; and if death ensues, the party so interposing will be justified. This is the more so in situations involving the principal civil and natural relations, namely, master and servant, parent and child, husband and wife. Here, killing an assailant in the necessary defence of each other is even more justifiable, the act of the relative assisting being considered the same as the act of the party himself. Let it be supposed that a son shoots and kills his father who is assaulting his mother. If the son had reasonable grounds for believing and honestly believed that his mother's life was in imminent peril, and that the shot he fired was absolutely necessary for the preservation of her life, the homicide is justifiable on the ground of lawful defence.

2.2. Excusable homicide

Killing under the influence of provocation. Killing under circumstances of provocation is culpable. It is culpable because in the general run of cases the slayer would have been engaged in some sudden affray for which he is not entirely blameless. He would have been involved in a brawl or quarrel. Passion would have been kindled on each side. Blows would have passed between the parties. However, in some jurisdictions killing under provocation though culpable, is excusable through the benignity of the law. Even then it is excusable only if before the mortal stroke given the slayer had declined further combat, retreating as far as he conveniently or safely could before he turned upon his assailant; and the slayer, being closely pressed by his antagonist, killed him through necessity to avoid his own immediate destruction.⁶⁹⁸

In this country the matter of killing under the influence of provocation is decided upon the established principles of provocation stated in section 85. The act of the assailant must be unlawful. It must be directed against the person provoked or against a person within the principal civil and natural relations and in his presence. The provocation must be of a kind to deprive an ordinary person of self-control. The retaliation must be immediate, and must be proportionate to the provocation. The law declares intentional killing to be proportionate to a provocation by violent blows or injuries. It also declares the intentional killing of a spouse or that spouse's lover to be proportionate to the provocation of finding them in the act of adultery.⁶⁹⁹

⁶⁹⁸ Killing under circumstances such as these was usually indicated in old English common law by the legal term 'chance medley' or casual affray (*'chaude mêlée'*, i.e., an affray in the heat of blood or passion).

⁶⁹⁹ Section 85(2)(3).

The person who kills under provocation is culpable. The fact of provocation does not excuse the killing. It merely diminishes responsibility, the effect of diminished responsibility being that it reduces the prescribed penalty for the homicidal offence committed (murder or assault occasioning death, depending on whether the killing was intentional or not). By section 87(1)(a) where responsibility is by law diminished, the penalty of death or of life imprisonment shall be reduced to imprisonment for from 2 to 10 years.

Killing by misadventure (pure accident). Homicide by misadventure occurs where a person happens unfortunately to kill another in purely accidental circumstances without intending the act that led to the killing, without intending to cause death or unlawful harm, and without gross negligence on his part. The subject is covered by section 77, which laconically provides that “no criminal responsibility shall arise from accident.” If a motorist is caught in a violent storm and his car is propelled to the side of the road hitting and killing a pedestrian, the death is a pure accident and excusable, and in terms of section 77 gives rise to no criminal responsibility. The propelling of the car was not intentional, the hitting of the pedestrian was not intentional, and the resulting death was not intentional, and the motorist was not negligent. The death is by misadventure and is not indictable.

The law permits hurts to be inflicted upon another under certain circumstances, for example, officers of justice in the exercise of their duty, private persons in furtherance of justice, parents and persons in *loco parentis* in the reasonable chastisement of children under their charge (though this privilege has become controversial and the chastisement of children has been outlawed in some jurisdictions on human rights grounds), physicians and surgeons in the proper treatment of their consenting patients, and those taking part with others who have agreed to join them in manly sports and physical exercises which are not contrary to law. Hurts in circumstances such as these are excusable. However, any hurt is unlawful if it goes beyond that to which the consent of the injured party has been given and the law has assented, or, in the case of domestic chastisement or official discipline, is inflicted beyond reasonable measure. If, therefore, in any of the above instances a man goes beyond the limits so prescribed he incurs criminal liability for what he has done, and if his actions have caused the death of another then the crime will be either intentional or unintentional homicide according to the extent of his *mens rea*.

In medical practice cases, courts have tended, as a matter of policy, to protect doctors if their honest endeavours should unexpectedly do more harm than good. Even in a given case of great want of anatomical and/or physiological knowledge on the part of the doctor, a court may be slow to convict lest an idea should be entertained that a doctor's practice may be

questioned whenever an operation fails. Even in what is called *mala praxis* (malpractice) in a medical person much depends upon whether the practice he has used is so bad that everybody will see that it is *mala praxis*. It has been admitted from the earliest times by English courts that if a person *bona fide* and honestly exercising his best skill to cure a patient, performs an operation that causes the patient's death, he is not guilty of assault occasioning death or of unintentional killing. The attitude of the court is that it would be most dangerous for the idea to get abroad that if an operation performed by the doctor should fail, that doctor would be liable to be prosecuted for involuntary homicide.

2.3. Difference in legal consequence between justifiable and excusable homicide

It may be stated as a general proposition that in cases of *justifiable homicide* there is no criminal responsibility and thus no criminal liability. No crime has been committed because the act is one authorized by law; and that being the case no questions of responsibility and of punishment arise. The killing is one the law has either ordained or at least sanctioned; and the slayer is entitled to commendation rather than condemnation. There may be an *actus* and a *mens*, but the *actus* is not *reus* and the *mens* is not *rea*.

By contrast, in cases of *excusable homicide* culpability exists. However, in some countries the law takes into account the special circumstances of the killing: in some instances it declares that no criminal responsibility arises; in other instances it excuses the deed by directing that responsibility is diminished or that the conduct may not be prosecuted. In other countries, including this one, the fact that a killing is excusable does not necessarily mean it ceases being an offence and may not be prosecuted. The conduct may be prosecuted. However, if it is prosecuted and a conviction follows, responsibility will be diminished, entailing a much reduced sentence than would normally be the case.

§3. Causation in the law of homicide

In all cases of homicide the question always arises whether the offender legally caused the death of the deceased; in other words, whether there is any causal link between the offender's act and the victim's death. If a man assaults another who dies at some point of time in the future the assailant has caused the death remotely or proximately. But the law is generally concerned with proximate cause, not remote cause because remoteness can go as far back as Adam-and-Eve causation.

Causation of course rests on both factual and legal causation. To cause the death of a man means to bring about his death at the time when, and the place where he died. The ways by which a man's death may be caused are varied:

poisoning, shooting, suffocating, strangulating, drowning, striking, starving, abandonment to inclement weather, burning, impaling, injecting with lethal substance, infecting another with a disease having fatal results, and very many other forms of death by which human nature may be overcome. But whether the victim's death can legally be ascribed or attributed to the assailant is quite another matter.

Precipitation of death. Since every human being is fated to die at some point in time⁷⁰⁰, the real question in homicidal cases is whether the act of the accused precipitated the victim's death. Suppose that a man sentenced to death is to be executed a mere hour later. Or suppose that he is suffering from an incurable disease from which he is bound to die shortly. In either case there is no apology for a man who kills him before the appointed time of death. It shall not lie in his mouth to aver that the patient would have died in any event, or that the condemned man was going to be executed in any event.

In the vast majority of cases that come before the courts there is little difficulty in determining whether the act of the accused caused the death of the deceased. If the accused shoots the victim in the head or stabs him in the heart with a dagger or gives him a heavy dose of deadly poison or chokes him, and he dies immediately, nobody will doubt that the accused caused the death of the victim. However, the course of events may take a strange turn or an unexpected twist. For example, the victim may die months or years after receiving the hurt; the victim may already have been labouring under mortal disease at the time of the fatal assault; the victim receives the physical hurt and dies after some intervening cause that is unexpected, extraordinary or unforeseeable; the victim's death is brought about indirectly such as by frightening him. Cases such as these raise enormous difficulties in deciding whether in law it can be said that the victim died at the hands of the accused.

Obsolete 'year-and-a-day' rule. In order to resolve this difficulty English pragmatism and empiricism evolved the old 'year-and-a-day' common law rule of thumb. According to this now obsolete rule death cannot be attributed to the wrongful act of the accused unless it occurs within a year and a day of the act. The rationale for the rule was the lack of medical precision in determining the cause of death after such a long period of time, coupled with the very real probability of an intervening cause being responsible for the death. In view of the great medical advances of the twentieth century the year-and-a-day rule became obsolete and has either been expressly discarded or not adopted at all by many jurisdictions.

If the defendant assaults the victim who dies long after the event, it seems most unlikely that the defendant will be guilty of homicide. Suppose that a

⁷⁰⁰ Including even those who will be still alive at the time of the second coming of Jesus Christ.

man dies of a cerebral hemorrhage five years after he was hit on the head. He would almost certainly not be regarded as a homicide victim even if the autopsy showed that the blow could well have been the remote cause of his death. If the cause of death is not proximate but remote (whatever be the differentiation in drawing the line between these two concepts) it is unlikely that the court will attribute the death to the accused. A remote chain of causation is innocuous, since the more remote the cause the less possible it would be to establish that the accused intended the result.

Killing a person labouring under disease. It is undisputed law that if a man is afflicted by some disease, which, by the course of nature, might possibly or will certainly end his life even in a matter of hours, and another gives him a wound or hurt which hastens his death, by irritating and provoking the disease to operate more violently and speedily, this is homicide in the part of whom such hurt or wound was given. The reason is that the person wounded does not die simply *ex visitatione Dei* (by natural causes), but his death is hastened by the hurt he received.⁷⁰¹ Thus it is homicide to kill even a terminally ill patient. The offender is not allowed to apportion his own wrong by averring that the deceased had, in any event, only a few hours or minutes to live. The point is that by inflicting a mortal assault upon a person labouring under a mortal disease, the said assault has caused the person to die sooner than he otherwise would have done.

Death caused by indirect means. There are several ways in which **A** may cause death by indirect means. **A** procures **B** an innocent agent to kill **C**. **A** by force seizes the hand of **B** which is holding a weapon and therewith kills **C**. **A** procures **B** who is an idiot or a lunatic to kill **C**. **B** is caught and killed in a trap laid for him by **A**. **A** sets a savage animal, a poisonous snake, or a scorpion loose and it kills **B**. **A** unleashes a German shepherd in **B**'s room and **B**, gripped by fear jumps out of the window, breaks his neck and dies. In cases of homicide by indirect means it is immaterial in point of law that the defendant himself did no actual corporal damage to the victim.⁷⁰² If a person, either by working upon the fancy of another, or by harsh and unkind usage, puts him into such excess of grief or fear that he dies suddenly, he has, on principle, legally caused that person's death.

Thus where **A** points a loaded gun at **B** and orders **B** to jump out of the window and **B** does so breaking his neck, **A** is guilty of homicide because he intended that **B** should do the act which resulted in his death. Now, suppose that **A** merely threatens or intimidates **B** without requiring him to do any

⁷⁰¹ *Russell on Crime*, p. 416.

⁷⁰² *Otto Enow v. The People* (1968-1970) UYLR 3.

particular act or omission but **B** does something which results in his death. An example is where **A** informs **B** over the phone that he has sent four gunmen to kill **B** at a given time. Before that time **B** takes away his own life to avoid facing a firing squad. In this situation **A** will be guilty of homicide only if **B**'s act was a reasonably foreseeable consequence of **A**'s threat or intimidation and not for **B**'s own intemperance.

Intervening cause. Complex problems of causation may arise in cases where the accused having inflicted the harm on the victim some external factor supervenes or concurs to cause death or interrupt the chain of events. For example, following **A**'s assault on **B**, **B** may die after the ambulance transferring him to the hospital crashes into a tree, or after he is struck by lightning on the spot where he is lying after the assault, or after he receives the wrong medical treatment, or after a fire broke out in the hospital to which he has been admitted for treatment, or after the car rushing him to the hospital is so recklessly driven that an accident occurs, or after he suffers a heart attack due to natural causes, or after sustaining a lethal injury while in the process of fleeing to avoid being assaulted further, or because he is a maniac-depressive person and the assault induces him to commit suicide. In such circumstances has **A** caused **B**'s death? In other words, can **B**'s death be attributed to **A**?

When the chain of events is interrupted by the act or omission of a third party who is not a confederate of the accused or in some way acting in pursuance of a common purpose with him, it has often been found convenient to distinguish that which a man has caused to happen (a contributory cause of death) from that for which he has merely offered the occasion, that is, his act or omission was merely the setting in which another cause operates. According to this distinction, if at the time of the death the original wound is still an operating cause and a substantial cause, the death can properly be said to be the result of the wound even though some other cause of death is also operating. If, however, the original wounding was merely the setting in which another cause operates it can then be said that the death does not result from the wound. The distinction is however too tenuous and doubtful.

Suppose that **A** shoots **B** leaving him to die and **C** comes along and aggravates the original wound, for example, by stabbing **B** in the heart or decapitating him, it is clear that **C** is guilty of murder for he hastened **B**'s death thereby shortening his life. Nevertheless it is more than likely that a court would also hold **A** liable on the ground that at the time of death, both wounds were contributory to the life shortening process. A court could even go further and hold **A** liable on the ground that his intention to kill **B** rendered **B** unable to defend himself against **C**, thereby proximately causing his death. It is doubtful that a court would confidently hold that **C**'s act was a *novus actus interveniens* (a new intervening event) that broke the chain of causation between

A's act and B's death. It is inconceivable therefore that **A** would go scot-free. At the very least, he would be convicted of attempted murder.

Doctrine of common purpose. Where **A** and **B** are confederates or act with a common purpose to kill **C** and their common endeavour leads to **C's** death, they are both guilty of murder in terms of the doctrine of common purpose. In terms of this doctrine each of them will be guilty of murder despite the fact that there is no causal link between the individual conduct of each and **C's** death, there being rather a causal link between their mutual or joint conduct and the death.

Death resulting from abstention. It is settled law that an omission to act when there is a duty to act, resulting in a certain situation, may be punishable; for example, where a mother fails to feed her baby, which then dies. A person's omission to act positively, resulting in a certain prohibited state of affairs, is punishable only if that person has a legal duty to act positively. Parents are under a legal duty to take all reasonable steps within their power to preserve the lives of their children. This responsibility attaches to them automatically by virtue of their parenthood. They cannot escape from this onerous responsibility by pleading their poverty or impecuniosity. There is no such defence under modern law. The law in fact ordains that whoever begets a child is duty-bound to provide it with necessities of life and protection. A woman is however not guilty of homicide simply because she fails to make proper provision for her expected confinement, resulting in the birth and subsequent death of her child.

But where a child is very young and not weaned and it dies as a result of its mother's refusal to suckle it when she is capable of doing so or when there is no other credible reason for doing so (e.g. mother-to-child HIV transmission), she can be convicted of homicide. The criminal law (section 285) constructively or fictionally treats as assault the administration of any substance harmful to health, or desertion of an invalid, or deprivation by guardian of nourishment or care (to a degree endangering health) to his ward. If a person dies through the administration to him of any substance harmful to health, or if an invalid dies as a result of abandonment, or if a guardian deprives his ward of nourishment or care and he consequently dies as a result, the one responsible for the deed would have caused the death and can be convicted of homicide.

Transferred intention. If a man with intent to commit an offence with respect to a particular object (person or property) commits the external element of that same offence thinking the object he has in mind is the same but in fact turns out to be different, he cannot escape conviction for the

offence he has committed by pleading that the object of the offence is not the one he had in mind. For instance, if he intends to murder Mola and in the dark he shoots at a man he believes to be Mola and actually kills him, but later discovers he has actually killed Ndia, he cannot escape a murder conviction. This is so even if the accused did not intend to kill Ndia. The fact that he intended to cause the *actus reus* which he in fact caused renders him criminally liable. In the same vein, if the accused intending to seriously wound Agbor, shoots the legs of a man who in fact is Agbor but misses and seriously injures Moma who is standing nearby, he has caused the *actus reus* of the same crime and is liable to conviction. In both cases the evil intention to kill or injure a particular person is transferred to the person actually killed or injured by mistake. The basic principle is that if an accused person with the mental element of a particular crime, does an act which causes the physical element of the same crime he is guilty, even though the result, in some respects, and the victim, are both unintended.

Thus, if **A** intends to cause the death of **V1** and does an act which results in the death of **V2**, **A** is guilty of intentionally causing the death of **V2** and thus of murder. It is irrelevant that the actual object, **V2**, was unintended or unforeseen. It is no ground of defence that **A** only intended to kill **V1** and not **V2** and that the death of **V2** was a mere mistake or occurred in an unexpected manner. The fact of the matter is that he intentionally used force and he intended the consequence (death) of the force he used. That the particular person actually killed happened to be different from the person he had in mind is an immaterial detail of identity. In *Mitchell*⁷⁰³, **A** intentionally hit **V1** in a post office queue. The blow caused **V1** to fall against **V2**, an 89-year-old woman who died as a result of the injuries sustained. The Court of Appeal had no difficulty in convicting **A** of intentionally causing the death of **V2**.

The law is the same where **A** intends to cause harm to **V1** and does an act that results in harm to **V2**. In *R. v. Latimer*⁷⁰⁴, **A** aimed a blow at **V1**, which glanced off him and struck **V2** who was standing beside **V1**, wounding her severely. It was held that **A** could be convicted of maliciously wounding **V2** because he had an intention to injure and it was irrelevant that he had no intention to injure **V2**.

The principle on the subject is stated in s. 284 in these terms: "For the purposes of section 275 to 281 inclusive⁷⁰⁵ the infliction of death or the use of force or interference shall be treated as intentional notwithstanding that it is intended to be inflicted on or used against a different person." The principle

⁷⁰³ [1983] 2 All E.R. 427, CA.

⁷⁰⁴ (1886) 17 QBD 359, CCR.

⁷⁰⁵ Those sections deal with the following offences: murder, capital murder, grievous harm, assault occasioning death, assault occasioning grievous harm, simple harm, and slight harm.

here enunciated is more restrictive than the ‘doctrine’ generally referred to as ‘transferred malice’. First, s. 284 is limited to the transfer of intention. It does not extend to the transfer of ‘malice’ (ill-will or evil motive). It does not extend to the transfer of ‘fault’ (that is, the state of mind denoted as ‘negligence’, ‘recklessness’, ‘carelessness’ or ‘rashness’). The principle stated in section 284 is thus that of ‘transferred intention’ only and does not include ‘transferred fault’ or ‘transferred malice’.

Secondly, the section 284-principle is confined in its application to cases of fatal and non-fatal assaults. It is inapplicable to cases of damage to or destruction of property. Thirdly, it is worthy of note that the principle does not apply where the accused acted with the intention for one offence but unexpectedly commits the physical element of another offence. If **A** throws a stone at **V** intending to injure him, but **V** ducks and the stone hits and damages the windscreen of a car parked nearby, **A** cannot be convicted of intentional damage of the car. He may however be convicted of reckless damage if recklessness suffices and he is proved to have been reckless as to the risk of the type of damage which he actually caused.

The logic of section 284 appears to be that if **A** intended to harm or kill a human being and intentionally does an act which results in harm to or the death of a human being, the identity of the person injured or killed is an immaterial particular or detail. Against this line of logic it could be said that an indictment for murder or other form of assault alleges the killing or assault of a specific identified human being and not just ‘a human being’ without any particularization. Nonetheless, the doctrine of transferred malice or intent or fault is well established in the jurisprudence of the criminal law. The doctrine appears to be a simple application of the wording of the *mens rea* requirement of an offence. “This being so, the general practice of writers to dignify this simple application of the *mens rea* requirement by calling it the doctrine of ‘transferred fault’, ‘transferred intention’ or ‘transferred malice’ seems unnecessary.”⁷⁰⁶

There are instances where the ‘doctrine’ of transferred malice is inapplicable. If **A** intends to kill his neighbour’s dog and actually shoots at the dog standing near a hedge but unknowingly kills his neighbour who was lying by that hedge **A** cannot be convicted of killing the dog because the dog was in fact not killed; nor can he be convicted of murder because he had no *mens rea* of the crime.

The doctrine of transferred malice comes into play only when the *actus reus* and the *mens rea* of the same offence coincide. In *Pembliton*⁷⁰⁷, **D** had been fighting with persons in the street. He threw a stone at them. It missed but went through the window of a nearby public house. **D** was charged with

⁷⁰⁶ R Card, Criminal Law, p. 80

⁷⁰⁷ (1874) L.R. 2 CCR 119.

maliciously damaging the window. His conviction was quashed because he had acted with intent to injure persons and not with intent to injure property. The court observed that, “the prisoner threw the stone which broke the window, but that he threw it at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window.”

Negligent treatment of wound. The ‘negligent treatment of a wound’ cases present substantially the same problem as cases in which a third party interrupts the chain of events. Where **A** seriously wounds **B** in an attempt to kill him and **B** dies of negligent medical treatment, **A** is guilty of murder. Provided the victim’s death is traceable to the injury inflicted by the accused, it will avail him nothing to show that the deceased might have avoided the injury by proper precaution or that his death from the injury might have been prevented by proper care or treatment. Supposing that **A** injures **B**’s finger and **B** refuses, despite a strong recommendation by a surgeon, to have it amputated. Later, a malignant condition sets in and when the finger is eventually amputated it is too late and **B** dies of that malignant condition. On a charge of murder it will not lie in the mouth of **A** to argue that **B**’s refusal to allow amputation of the finger was the cause of death.

The law is the same where **B**, wounded by **A**, and taken (or not taken) to hospital refuses on religious grounds, to take any medication or to receive any medical attention and subsequently dies. On a charge of murder it will be idle for **A** to argue that **B**’s religious beliefs, which inhibited him from accepting medication or medical treatment, were unreasonable and therefore the actual cause of death. The policy of the law is that those who use violence on other people must take their victims as they find them. The victim’s beliefs or his particular physical or physiological or mental condition cannot operate as a defence in the assailant’s favour. The hurt received brought about the death, and the victim’s refusal to stop this end coming about does not constitute a *novus actus interveniens* (a new act intervening).

The principle to be extracted from these examples is that a person who does grievous harm to another person is deemed to have killed that other person even if the immediate cause of death was medical treatment to which the deceased had recourse, or (and this is a controversial proposition) if the cause of death was refusal by the deceased to have medical treatment.

This principle is inapplicable where the treatment to which the deceased had recourse is abnormal or where the treatment is outrageously negligent and it is clear that the treatment is the primary cause of death. Suppose that **A** shoots at **B** who undergoes an operation for the removal of the bullets and dies while under anaesthesia because he has a weak heart. If the medical treatment was proper, **A**, and not the surgeon, is liable for causing **B**’s death. But if the treatment was injudicious or improper then the surgeon will be

liable. Thus, if it is shown that the surgeon knew that **B** had a weak heart and would not survive anaesthetics but nevertheless acted in reckless disregard of this fact then surely the treatment was not reasonably proper under the circumstances and was not applied *bona fide*.

Intervening act by victim himself. The intervention into the chain of events may be by the deceased himself. In such a case it is no defence that the deceased is guilty of contributory negligence (as that expression is understood in the law of torts). The sole question for the criminal court is this. Did the assailant materially contribute to the death of the deceased? If **B** flees from **A** who assaults him or who threatens him with harm, and **B** then dies from injuries sustained in the course of his escape, there is a causal link between **A**'s act, by which he creates a danger, and **B**'s death. **A** will therefore be criminally liable for **B**'s death. **A** will however not be liable if **B**'s fear and subsequent conduct are due to his own intemperance, or are unreasonable, or are completely disproportionate to the threat or danger.

There is also a causal link where **A** encourages **B** to commit suicide, or provides him with the means of doing so, and **B** indeed commits suicide. In this particular example of suicide procured by **A**, an indictment for abetment of suicide would fail since suicide is not indictable. In law **A** has caused the death of **B** and thus liable to be prosecuted for murder. Also, as earlier noted, a person's refusal or omission to submit to medical treatment after being assaulted does not break the chain of causation and so the assailant remains criminally liable. It has however been argued that in modern society it is normal for injured people to seek medical treatment and that a person's refusal on religious grounds to undergo or allow a blood transfusion which would undoubtedly save his life ought to be regarded as conduct breaking the causal chain.⁷⁰⁸

Assailant's subsequent conduct. Sometimes the issue of an intervening cause arises in connection with the assailant's subsequent conduct after assaulting the victim. Supposing that **A**, wanting to kill **B** assaults him and then thinking that **B** is dead while in fact he is still alive, hides or buries or burns the supposed corpse. **A**'s subsequent conduct is not a *novus actus* and he will be criminally liable for **B**'s death as a result of the concealment, the burial or the burning, as the case may be. The policy consideration for holding **A** liable is that it is not unusual, abnormal or unexpected for a murderer to hide his victim or to try to erase the evidence of his evil deed. In contemplation of law both acts constitute a single transaction performed by the same person with the same end in view.

⁷⁰⁸ Snyman, *Criminal Law*, p. 84.

Remoteness, Act of God. A person who assaults another is not liable for the subsequent death of that other person where such death results from accident, acts of nature, *vis major* (irresistible force), or is remotely connected with the assault. **B** is assaulted by **A** and is taken to hospital for medical treatment. While **B** is waiting to receive or is receiving medical attention in the emergency room there is an outbreak of fire in the room and **B** is burnt to death. The fire is a *novus actus interveniens* ('a new act intervening') and **A** is not criminally liable for **B**'s death. The assault is too remote a cause of the death.

The result is the same where **A** shoots at **B** intending to kill him but in fact misses. **B** then runs into a building (which he otherwise would not have entered) in order to avoid being shot. Unknown to **B** there is a time bomb planted in the building by a terrorist. The bomb goes off shortly after **B**'s entry into the building and he is killed in the blast. **A** is not guilty of murder even though the victim would not have been killed *but for* the original shot fired at him by **A**. Here too the missed shot is too remote a cause of the death.

Suppose again that **A** assaults **B**, and **B** who is injured is killed by a thunderbolt, or a hurricane, or a wild beast, **A** will not be guilty of murder. In these two examples the eventualities are Acts of God and not foreseeable by **A**. They are eventualities that general human experience does not lead one to expect after an assault.

Burden of proof. Consistently with the general rule in criminal procedure that the legal burden of proof lies with him who accuses, the prosecution must prove that the accused caused the death of the victim. In discharging this onus of proof it is not enough for the prosecution to show that the conduct of the accused *could have* caused the death. On a charge of homicide there must be compelling proof of the *corpus delicti*. Evidence of the corpse of the murdered person is the ultimate proof of death. However, the fact that the corpse is not found does not *ipso facto* negate homicide and is immaterial because death is a fact provable by circumstantial evidence. But the circumstantial evidence must be such as to render the commission of the crime certain.

Offences against Personal Tranquility

§1. Violations of certain individual rights

International human rights instruments guarantee to everyone the right to liberty and to freedom from arbitrary arrest or detention⁷⁰⁹; the right not to be required to perform forced or compulsory labour⁷¹⁰; and the right not to be subjected to arbitrary interference with one's privacy, family, home or correspondence, nor attacks upon one's honour or reputation⁷¹¹. The criminal law gives added teeth to these guarantees by penalising anyone who infringes them.

1.1 False arrest

It is an offence under section 291(1) for anyone to deprive another, *in any manner whatever*, of his liberty. The offence carries a penalty of imprisonment for from 5 to 10 years plus a fine⁷¹². The penalty is doubly steep, being imprisonment for from 10 to 20 years, in any of the following cases: (i) where the offender is a public servant⁷¹³; (ii) where the deprivation of liberty lasts for more than a month⁷¹⁴; (iii) where the deprivation of liberty is accompanied with physical or mental torture⁷¹⁵; or (iv) where the arrest is effected with the aid of a forged order from a public authority or with the aid of a uniform unlawfully worn, or is effected pretending an appointment not held⁷¹⁶.

Unless a person is under some lawful restraint, he has a right to unrestricted freedom of movement. Any interference with a person's right of unrestricted freedom of movement is denoted as 'false imprisonment' in some jurisdiction, and as 'false arrest' or 'arbitrary arrest' in others. The terms are however synonymous. They mean any detention that is not justified by law. Every arrest necessarily involves a detention. Put in another way, detention necessarily involves arrest, for a person cannot be detained if he has not been arrested. Therefore, a false arrest is also necessarily an unlawful detention. What makes the arrest or detention false is the fact that the act is not grounded in law; that is to say, it lacks legal justification.

⁷⁰⁹ International Covenant on Civil and Political Rights, article 9; African Charter on Human and Peoples' Rights, article 6.

⁷¹⁰ International Covenant on Civil and Political Rights, article 8(3)(a).

⁷¹¹ Universal Declaration of Human Rights, article 12; International Covenant on Civil and Political Rights, article 17.

⁷¹² From 20 000 to 1 million francs. Section 291(1).

⁷¹³ Section 132(2).

⁷¹⁴ Section 291(2)(a).

⁷¹⁵ Section 291(2)(b).

⁷¹⁶ Section 291(2)(c).

It is immaterial how the victim was unlawfully deprived of his liberty. Suppose that **X** is detained in a supermarket because a shoplifter is known to be in the building and the management decides to examine all customers before they leave. Suppose also that **Y** is not allowed to leave a restaurant for an unreasonable amount of time because the waitress misplaced his money and he cannot prove that he paid his bill. Suppose again that **B** restricts his own movement because he is afraid that someone who has threatened to smash his car can and will carry out his threat. Suppose yet again that **D** is peacefully taking part in a political rally and a policeman orders **D** to go with him to the police station, saying, "You're under arrest." **D** follows the policeman to the station because he believes he has the authority to say what he said. These are all examples of cases of false arrest for which the offender may be prosecuted and convicted under s. 291.

An actual example is the case of *Christole Ane v. The Commissioner of Police*⁷¹⁷. The appellant, an Assistant Superintendent of Police stationed in Nkambe, gave instructions to his second in command to proceed to two villages for the purposes of carrying out searches in the premises of three named persons for the recovery of stolen property or things unlawfully obtained and to bring the men down to Nkambe for further enquiries as to cattle thefts. Three search warrants were duly made out, issued and executed by eight police officers. Nothing incriminating was found in the three houses that were searched and the three search warrants were duly endorsed to that effect. Nevertheless, the officers brought the three suspects down to Nkambe. They informed the appellant of their return with the three men and also of the unsuccessful search in the homes of the three. The appellant then gave instructions that the men should be detained for previous cow theft. The men were held in police custody for three days and then released on Police bail. A day later police investigations were begun into this matter. The appellant was arrested 5½ months later and charged with false arrest contrary to section 291(1) of the Penal Code. His Worship Niger Thomas found him guilty and sentenced him to 5 years' imprisonment and to a fine of 20 000 francs. The appellant gave notice of appeal on the same day and was released on bail pending the hearing of his appeal.

The appeal was argued before Dervish J. sitting in the High Court at Buea. It was contended on behalf of the appellant that the provisions of section 291(1) do not apply to a Police Officer acting in the course of his duties because in terms of section 76 of the Penal Code no offence is committed where an act or omission is done in execution of the law or is authorized by law, and is performed in accordance with the conditions prescribed by law. In the view of the learned Judge however, the protection given by s. 76 would avail the appellant only if he acted within the scope of the law authorizing him

⁷¹⁷ (1968) W.C.L.R. 62.

to arrest without a warrant, or, to make a lawful detention. For, a police officer is liable to an action for false imprisonment if he unlawfully arrests or detains another person without a warrant or if he makes a lawful arrest but detains the person for an unreasonable time without taking him before a magistrate.

However, if the information on which the appellant acted turned out to be wrong his suspicion, which grounded the arrest and detention, does not thereby become unreasonable. The correctness or falsity of the information does not render the suspicion to be unreasonable, unless of course the appellant knew or had reason to believe that the information given to him was false. It is trite law, the Judge pointed out, that a police officer may arrest a man upon reasonable suspicion of felony although it afterwards appear that the man is innocent, or even that no felony was, in fact, committed.

Still, in the instant case the appellant overstepped the authority vested in him while acting in pursuance of the law or in execution or intended execution of the law. He did the right things in the wrong manner. He failed to produce the arrestees before a Magistrate within 24 hours of their arrest. He failed to grant them bail to appear at any police station at a specified date. He kept them in custody for three days without a Court Order. The appellant was thus liable to be prosecuted under section 291(1) of the Penal Code. But, in terms of section 2(a) of the Public Officers' Protection Ordinance (Cap. 168), the prosecution of the appellant should have been commenced within 3 months. Failure to do so within that limited period rendered the prosecution statute-barred.

Allowing the appeal and quashing the conviction and sentence the learned Judge observed that here was a case of an act done, albeit wrongly, by the appellant during the course of his duties and connected with his duties. He was excessively zealous in the way he carried out his duties. He was entitled to benefit from the provisions of section 2 of the Public Officers' Protection Ordinance. Furthermore, the learned Magistrate had no jurisdiction to try the case as section 291(1) of the Penal Code, when considered in the light of section 132(2) of the Penal Code, carries a sentence of imprisonment of from 10 to 20 years, which is far beyond the jurisdiction of Magistrate Grade I with extended powers.⁷¹⁸

1.2 Forced labour

A person commits an offence under section 292 if, for his personal advantage, he compels another to do any work or to render any service which he has not offered of his own free will. On conviction the offender is liable to imprisonment for from 1 to 5 years and/or fine⁷¹⁹. Where the offender is a

⁷¹⁸ See also the judgment of Fergusson J. in *Joshua Nwana v. The Commissioner of Police* (1965-1967) W.C.L.R.15, and *F.E. Timothy v. The People* (1965-1967) W.C.L.R. 17.

⁷¹⁹ From 10 000 to 500 000 francs. Section 292.

public servant the penalty is imprisonment for from 2 to 10 years and/or fine⁷²⁰.

Forced labour, like child labour, is a slavery-like abuse prohibited by international law. The phrase ‘for his personal advantage’ is used advisedly; for, it has the effect of removing from the scope of the offence labour required in consequence of a sentence or order of a court, labour required of any person while he is lawfully detained that is reasonably necessary in the interest of hygiene or for the maintenance of the place at which he is detained, any labour required of a member of a disciplined force in pursuance of his duties as such, any labour required during any period when the country is at war or other situation of emergency, or any labour reasonably required as part of reasonable and normal communal or other civic obligations.

1.3 Invasion of residence

The residential occupier, like the homeowner, has a time-honoured right to the undisturbed possession and quiet enjoyment of his residence. This means he may keep off it anyone he does not want. As far as private persons are concerned he has an almost absolute right to keep them off his residence if he does not want them there. Anyone who enters or who remains in his residence against his will commits the tort of trespass and the crime of invasion of residence.

A person is thus guilty of an offence under section 299(1) if he enters in another’s residence against his will. A person is also guilty of an offence under the same provision if he remains in another’s residence against his will. It matters not that the offender had initially entered with permission. If **X** enters **Y**’s residence without permission and remains there without permission, he can be convicted of two offences, namely, entry without **Y**’s permission and remaining in the residence without **Y**’s permission. If **X** enters with **Y**’s permission but remains without **Y**’s permission, **X** is guilty of remaining in the residence without permission. If **X** enters without permission but remains with permission, the permission to remain does not relate backwards as to validate the initial entry without permission; **X** can be prosecuted for entry against the will of **Y**.

The requirement that entry into, or remaining in, the residence must have been against the will of the occupant would suggest that the occupant must be present at the residence at the material time of entering or remaining inside to oppose it. Let it be supposed that **X** enters/breaks into **Y**’s residence in order to squat in it while **Y** is abroad. It is doubtful that **X** can be convicted for an offence under section 299(1), though he may be convicted of some other offence. **X** will however be guilty of an offence under the section if **Y** on his return requests **X** to leave and he failed to do so. The mere fact that entry was

⁷²⁰ From 20,000 to 1 million francs. Section 132(2).

during Y's absence does not necessarily mean it was against his will. Even if Y were present no offence would be committed if Y is not opposed to the intended entry. Y must know of the intended entry, so that if he was asleep at the time it cannot be said that the entry was against his will.

The reason for entry or for remaining in the residence is immaterial, for example, to serve process, to deliver utility bills (water, electricity, gas, telephone), to question or interview the occupant or someone else in the residence, or to gatecrash a party. A man's residence is his castle, even if it is a shack, and no one may enter without his consent or lawful authority. A trespassory entry on land ancillary to the residence may be prosecuted under section R. 368(5).

However, the right of an occupier to undisturbed enjoyment of his residence is not absolute. His right to bar public officials from his residence is more limited. Police officers with a proper search warrant may enter and search the occupier's residence without his permission. In fact, if the occupier does not let them in they may gain ingress by breaking in to do the search. They may also enter to make a lawful arrest with or without warrant. Special laws grant other public officials such as fire inspectors and health inspectors, the right to enter and inspect homes at reasonable times and upon proper identification of themselves and authority. If the owner refuses entry a court order may be sought authorizing them to enter.

'Residence' includes any immovable structure. It also includes any movable structure such as any conveyance (vehicle, caravan, vessel, or houseboat) designed or adapted for residential purposes. Also comprehended within the meaning of 'residence' is the ordinary means of access thereto such as veranda, doorsteps, front door but not communal hallway or staircase in a block of flats.

Either offence under section 299(1) is punishable by imprisonment for from 10 days to 1 year and/or with fine⁷²¹. The penalty incurred is imprisonment for from 20 days to 2 years and/or with fine⁷²² where the offender is a public servant (section 132(2)), or where the offence was committed at night or with the aid of force, threats or other interference (section 299(2)).

However, no prosecution for an offence under s. 299 may be commenced without the prior complaint of the injured party (section 299(3)). A person on trial under this section is therefore entitled to raise a preliminary objection that the prosecution has been commenced without the complaint of the residential occupier if indeed the prosecution had been initiated without the prior

⁷²¹ Of from 5.000 to 50.000 francs. Section 299 (1).

⁷²² Of from 10.000 to 100.000 francs, for invasion of residence (section 299) is listed under section 132(2) as one of the offences where the penalty is doubled where the offender is a public servant.

complaint of the injured party.

1.4 Tampering with correspondence

Section 300 punishes anyone who (i) destroys, or (ii) conceals, or (iii) opens, another's correspondence without permission from the addressee. The term 'concealing' correspondence is wide enough to include, in appropriate cases, 'stopping' or 'intercepting' correspondence. If **X**'s letter or email to **Y** is stopped or intercepted so that it does not get to **Y**, the correspondence has been concealed from **Y**. But there is no necessary correlation between opening another's correspondence and reading it. A person's correspondence may be opened but not read, and it may be read without being opened as where a message written at the back of a postcard and put in an envelope is scanned and read. It is an open question whether telephone conversations, over a land or a cell phone, are covered by the notion of 'correspondence' as to bring the secret surveillance or unauthorized tapping of such conversations within the mischief of the section and punishable as 'opening' another's correspondence.

However, discouraging or preventing a person from sending a correspondence does not amount to interference as there is in the first place, no correspondence that can then be said to have been tampered with. The section appears to have in contemplation correspondence by letter. But there is no reason why in this Internet age correspondence by email may not be construed as falling within the mischief of the section and so make the hacker liable to prosecution.

Each of the offences in the section is punishable by imprisonment for from 15 days to 1 year and/or by fine⁷²³. Where the offender is a public servant, his status as such becomes an aggravating circumstance enhancing the penalty incurred, which then becomes imprisonment for from 30 days to 2 years and/or a fine⁷²⁴.

On a prosecution for any of the offences under the section, it is a complete defence that the act was done with the permission of the addressee (the permission of the sender will be no defence) of the correspondence. Further, the status of spouse, parent or guardian is also an absolute defence to a charge under section 300 in respect of the correspondence of one's own spouse or that of one's children or wards, as the case may be. In terms of section 300(2) it is not an offence for a spouse to tamper with the correspondence of the other spouse, or for parents to tamper with the correspondence of any of their children below 21 years of age and not emancipated. By the same provision it is also not an offence for guardians or persons responsible by custom to

⁷²³ From 5.000 to 100.000 francs. Section 300 (1).

⁷²⁴ From 10.000 to 200.000 francs, for s.132 (2) provides that the punishment provided by s.300 shall be doubled where the offender is a public servant.

tamper with the correspondence of their wards.

The validity and appropriateness of the defence may be doubted in view of the right to privacy guaranteed under human rights law, which includes the right to respect for one's correspondence.

§2. Injury to honour and reputation

2.1. *False report*

This offence is known in some jurisdictions as malicious prosecution. Section 304 (1) provides: "Whoever makes to any person in authority, whether public or private, a false report liable to lead to prosecution or to disciplinary measures shall be punished with imprisonment for from six months to five years and with fine⁷²⁵, unless he shows that he had good reason to believe the report to be true."

The report as a whole must be a lie. The prosecution must prove that there was a *report* that was *false* and was *made* to a *person in authority*; and that the false report was *liable* (that is, likely) to lead to prosecution or disciplinary action against the person concerned. Report includes a complaint made. It must be shown that the accused knew or was aware of the falsity (untruthfulness) of the contents of the report, or at least that he was reckless as to whether the report was true or false. A report is not false merely because it contains a lie, i.e., it contains a false statement. It must tell a lie about what it has to say. The general tenor of the report must be a lie. If that is the case, that lie cannot be cured by the fact that the report contains one or two averments that are true.

If the report is anonymous, that fact could be a pointer that the accused was aware of its falsity. Anonymity of the false report is in fact an aggravating factor entailing a higher penalty, which is imprisonment for from 2 to 5 years (section 304(2)).

The opportunity to consider section 304(1) came up in *The People v. F.Y. Gorji-Dinka* (1970)⁷²⁶. Disappointingly, however, apart from a passing reference to the section in the dissenting judgment of O'Brien Quinn, J the section was in fact not discussed. The defence objected to the production and admissibility of the document that formed the very basis of the charge against the defendant, on the ground that the said document was protected by the doctrine of absolute privilege. The respondent, a Barrister-at-Law, was indicted in the High Court with making a false report contrary to section 304(1). The indictment alleged that he made to the Chairman of a Commission of Inquiry, Mr. Rupert Thomas, a person in authority, a false report by submitting a memorandum accusing Frederick Eko, Chief Law Officer of West Cameroon of partiality, bias, tribalism and corruption before, during and after the

⁷²⁵ From 10 000 to 1 million francs.

⁷²⁶ (1968-1970) UYLR 112.

Commission of Inquiry into the West Cameroon Electricity Corporation (Powercam) which was liable to lead to the prosecution or disciplinary proceedings against the said Frederick Eko.

The document in question had been handed to the Chairman of the Inquiry, Mr. Thomas, at his request, and only for his personal information, outside the scope of the Inquiry i.e. after the Inquiry proceedings were over. The nub of the matter the Court had to confront was whether the document in question was evidence within the meaning of the Commissions of Inquiry Ordinance and whether it was absolutely privileged. The majority judgment of the Appeal Court (Cotran, CJ and Kesiro, JA) held that the document in question constituted evidence taken under the Commissions of Inquiry Ordinance and hence inadmissible in the proceedings, and that the document was protected by the doctrine of absolute privilege and could not, as the trial Judge had also held, be produced in the criminal proceedings against the respondent. Per Cotran CJ:

“In our judgment, the word ‘evidence’ as used in the Commissions of Inquiry Ordinance is not to be given its ordinary meaning as when it is used in a Court of Law, that is to say, oral evidence given on oath. It is quite clear that the Ordinance envisages taking evidence in 4 separate ways, viz: in writing not on oath, orally not on oath, in writing on oath, and orally on oath. ... In our opinion, it is quite clear that what is envisaged in [s. 7 (a)(b)(c) of the Ordinance] is that in the first instance any person wishing to give evidence to the Commission may do so either in writing, e.g. by submitting a memorandum, or orally. At this stage (s. 7 (a)) no question of taking an oath arises and clearly such evidence is receivable without an oath. The next step, provided for in s. 7 (b) is that the commissioners are given power to require the evidence, whether written or orally which was not made on oath, “to be made on oath or declaration”. And then finally, s. 7 (e) makes it clear that the evidence given at the first stage, i.e. in writing or orally but not on oath, is admissible in the Inquiry proceedings, albeit inadmissible in a court of law.

We are therefore of the opinion that Dervish J. was wrong in holding that it was a precondition of the treatment of Document A as ‘evidence’ that it should have been scrutinized by the commissioners and then, if the commissioners so required, made on oath or declaration. We are of the view that once the document was handed to Mr. Thomas as Chairman, the document became evidence in writing under section 7 (a) although not on oath. ... For the foregoing reasons, we hold that Document A constituted evidence taken under the Commissions of Inquiry Ordinance and hence inadmissible in these proceedings by virtue of section 10 of that Ordinance. ... The learned trial Judge dealt ... at some length [with the point whether Document A is protected by the doctrine of absolute privilege]. We agree with his enunciation of the law relating to the doctrine of absolute privilege of counsel as expounded in the leading case of *Munster v. Lamb* (1881-5) All

E.R. 791 and other English cases, and as stated in Halsbury’s Laws of

England, 3rd edition, vol. 3, para. 40 and vol. 24, paras 87 and

89. We agree with the learned Judge that the laws and rules apply in the present case in that Document A contained statements made by counsel in the course of a judicial inquiry. Finally, we endorse the Judge's findings of fact that Mr. Dinka was acting in his capacity as counsel when he handed the said document to Mr. Thomas. ... Some hundred years ago in the case of *R. v. Skinner* (1772), Loft, 54; 98 E.R. 529, Lord Mansfield said, "Neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office." Again, in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* (1891-94) All E.R. 429, Lopes L.J. stated at p. 436, "The authorities establish beyond all question that neither party, witness, counsel, jury, nor Judge, can be put to answer civilly or criminally for words spoken in office." ... By our own law in Cameroon, defamation, as well as being a tort, is a criminal offence by virtue of s. 305 of the Penal Code. The offence of making a false report is very akin to defamation and in fact precedes it as s. 304 in the Penal Code. It would be strange indeed if the doctrine of absolute privilege should apply to the tort of defamation and not to the criminal offence of defamation and making a false report, and we are definitely of opinion that the doctrine does apply even if the statements made by counsel in the course of a judicial proceedings amount to criminal offences. ...

We feel we should be failing in our duty if we finally dispose of this case without commenting on the conduct of the prosecution from beginning to end. The indictment, as all indictments are, is laid by the Procureur-general [i.e. Chief Law Officer] of West Cameroon, *on behalf of the People*. The indictment makes serious allegations against a leading barrister-at-law in West Cameroon, namely Mr. F.Y Gorji Dinka. The allegations are that Mr. Dinka has accused Mr. Frederick Eko, none other than the Procureur-General himself, of tribalism, partiality, corruption, etc. In these circumstances, it is quite evident that Mr. Eko had a personal interest in the matter. Having such a personal interest, we cannot see how he can properly discharge his official functions as Procureur-General, on behalf of the People, impartially and fairly. He, being the person responsible for prosecutions on behalf of the People, must make a decision on their behalf, whether to prosecute or not. In this case he took the decision to prosecute despite obvious difficulties relating to the admissibility of Document A, the only evidence which could possibly implicate Mr. Dinka, and despite the fact that the alleged offence is something very akin to defamation which is normally treated as a civil matter. Can it be said that another prosecutor, with no personal interest in the matter, would have taken the same decision? But the matter does not end there. At the trial, the Judge having ruled that Document A was inadmissible, the prosecutor proceeded to call no less than 13 other witnesses, including Mr. Eko himself, none of whom gave evidence which could remotely incriminate Mr. Dinka. The learned trial Judge had therefore, no alternative but to hold that there was no case to answer. ... But still the story continues. The prosecution then decided to appeal to this Court, and the appeal is conducted for the prosecution by Mr. Eko himself. Again, he chose to act officially on behalf of the People, in a matter where his own personal interest looms very largely. It has repeatedly been

said in the courts, and we would like to take the opportunity in this case, to repeat, that the function of the prosecution acting on behalf of the People in criminal cases is to act fairly and impartially in the interest of justice. It is not the duty of the prosecution to secure convictions, and especially not to use their official position for their own personal advantage.”

O’Brien Quinn, JA in his strong dissenting judgment took the opposite view:

“I have been informed of the salient points in the majority decision of the Court but have not been permitted to read it. Nevertheless, I have just now heard it and, after carefully studying the proceedings in the light of the law contained in the Commissions of Inquiry Ordinance, in our Federal Penal Code and in the decisions of the courts in Nigeria, England, Ireland and Australia, I cannot agree with the decision of my learned brethren. ... I am of the opinion that the document which the respondent gave to the Chairman of the Inquiry, Mr. Thomas, at Mr. Thomas’ request, and only for his, Mr. Thomas’ personal information, cannot be said to have been ‘evidence taken under the Ordinance’ as defined in s. 10 or evidence of any kind whatever. It was information given to the Chairman outside the scope of the Inquiry which is the substance of the charge laid against the respondent. ... To deal with the question of counsel’s statements being absolutely privileged, I would say that in my view, the majority decision relies too heavily on the case of *Munster v. Lamb* ... and the cases depending thereon without taking into account the fact that the present cases differs materially, in its facts, from those on which *Munster v. Lamb* was based and without taking into account the more recent cases where the doctrine applied in *Munster v. Lamb* has been applied, refined and restricted in its scope. The most important recent case in England where the doctrine has been applied is also one where its scope has been restricted. The judgment, most in point in that case, is the judgment of Lord Justice Devlin and the case is *Lincoln v. Daniels* (1961) 3 All E.R. ...[in which he] at page 749 said, ‘The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done ‘*coram judice*’. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other documents which institutes the proceedings. The third is the most difficult of the three to define. It is based on the authority of *Watson v. McEwan* (1905) A.C. 480 in which the House of Lords held that the privilege attaching to evidence which a witness gave *coram judice* extended to the precognition or proof of that evidence taken by a solicitor’ This is the clearest and most authoritative statement of the law relating to absolute privilege in the recent decisions in England on the point, and the present case must be studied to see whether or not it comes within it. ... The question before this Court is, is it strictly necessary to extend the privilege to

cover a document handed by counsel to the Chairman of an Inquiry at his hotel bedroom after the Inquiry had ceased hearing evidence, and before deliberation? ... In my opinion, the document of the respondent does not come within the third category as to bring it within it would entail an extension of the privilege not warranted by principle and authority. ... I am of the opinion that [qualified privilege] is governed by the words of Lord Loveburn in *Adam v. Ward* (1917) A.C. at page 320, 'The fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or exercise of the right or the safeguarding of the interest which creates the privilege will not be protected', and I consider that the qualified privilege is also ousted as the report of the respondent went far beyond that which Mr. Thomas requested, and was, in any event, not relevant and pertinent to the discharge of the respondent's duty. ...

I entirely and emphatically dissociate myself from the gratuitous and unwarranted remarks made by my learned brethren about the Procureur-General, Mr. Eko. My learned brethren do not appear to realize that the Procureur-General is not autonomous in respect of the bringing of prosecutions or appeals but ... acts always 'under the supervision and control of the Minister of Justice.'⁷²⁷ ... I would conclude my judgment by reminding counsel of the words of Lord Chief Justice Cockburn delivered in the Middle Temple in 1864, and which are still valid today in Cameroon and elsewhere: 'The Advocate must wield the weapons of the warrior, not those of the hired ruffian. It is his duty to fight for his client *per fas*, not *per nefas*, and to reconcile his interests with the eternal interests of truth and justice'."

A report that is partly false and partly true. If the material contents of a report are untrue then the report, as a whole, is false and it makes no difference that some parts of the report are true if those parts relate to inconsequential matters. But there may be difficulties in deciding whether or not a report is false or true if the substance of the report is part true and part false. It is submitted that if the report is partly true and partly false the court would have to decide whether it is the false or the true part that was liable to lead to prosecution or disciplinary measures against the person concerned; and if it is the true part the charge will fail, but if it is the false part the charge will succeed provided the other ingredients of the offence are proved.

Report to a person in authority. It must be shown that the accused made the report and to a person in authority. The prosecution can thus not be based on newspaper accounts or public rumours, even if it can be shown that such originated from the accused. A person in authority includes a police officer, an

⁷²⁷ The learned Judge himself did not appear to have realised that the rule of compulsory prosecution (*la légalité des poursuites*) does not obtain in this country and that all prosecutions are governed by the principle of expediency or advisability (*l'opportunité des poursuites*). See C Anyangwe, *The Magistracy and the Bar in Cameroon*, CEPER, Yaounde, 1989, chapter 4.

employer, a village chief, officeholders, and so on.

It is unnecessary for the prosecution to prove that as a result of the false report the person concerned was actually prosecuted or subjected to disciplinary action. Where in consequence of the report a criminal prosecution has been commenced in the court in respect of the facts reported, any prosecution under section 304(1) must be stayed until the criminal trial triggered by the report has been finally disposed of (section 304(3)).

Defence. It is a credible defence to a charge under section 304(1) to show that the accused had good reason to believe the content of the report to be true. O'Brien Quinn, J delivering his dissenting judgment in the *Gorji-Dinka* case pointed out that when a person is charged under section 304 with making a false report to a person in authority, the exceptions to defamation enumerated at section 306 have no application to section 304. "The only exception allowed by law to this section is contained in the section itself in the words 'unless he shows that he had good cause to believe the report to be true.' In other words, it imports the question of showing reasonable belief in the truth of the report."

2.2. Defamation

A person has the right to freedom from unwarranted and untruthful attacks upon his honour and reputation. The right to honour and reputation is protected under the criminal law by the crime of criminal defamation. In terms of that crime, a person is guilty of criminal defamation under section 305(1) if he "injures the honour or reputation of another by imputations, direct or indirect, of facts which he is unable to prove." On a charge of defamation if an innuendo is alleged it must be pleaded otherwise the charge will fail. In *Nchang Boniface Chinje v. The People & Anor* (2005)⁷²⁸, the appellant in his capacity as President of the Parent-Teacher Association of Government School Azana, Bamenda, wrote to the Minister of Forestry and Environment stating that one Tabong, the Provincial Chief of Service for Forestry and Environment had, among other things, demolished the foundation of a three classroom building being constructed by the PTA of the school. The letter was captioned "Acts of Vandalism" and read in pertinent parts: "He [Tabong] is a very artful dodger and he has committed several criminal acts and the law has not been able to keep pace with him. It is very scandalous and shameful that a man of this high caliber is found misbehaving with public property under what guise only heaven knows or could it be that this man is insane and nobody has hardly taken notice of this?"

The Minister referred the matter to the Provincial Delegate for Forestry and Environment for investigation and Tabong was requested to furnish an explanation of his conduct. Tabong eventually went to the police and lodged a

⁷²⁸ Appeal No. BCA MS/31c/2003, unreported.

complaint for defamation against appellant. The charge laid against appellant alleged he had injured the reputation of Tabong by qualifying him as an insane man, a fact he could not prove. The finding of the trial court was that the words complained of amounted to an innuendo and that appellant's conduct was actuated by malice. Appellant was accordingly found guilty of defamation under section 305(1). The appeal against this decision was argued before Wacka, Angyiembe and Ambe, JJA. Held (Ambe J delivering the judgment of the Court), that the conviction, sentence and award by the trial court must be set aside. An innuendo in a charge of defamation, the Court pointed out, must be pleaded but in the instant case the court had relied on an alleged innuendo which had not been explained in the charge. The Court concluded that on a careful evaluation of the facts of the case malice cannot be imputed to the Appellant and that the letter he wrote falls within the terms of section 306(8) of the Penal Code.

Under section 305(5) it is also an offence "to defame the memory of a deceased person with intent to injure the honour or reputation of his living heirs, spouse or universal legatee." It is important to observe that although the provision speaks of 'defaming the memory of a deceased person' a dead person has no memory and whatever his reputation may have been it ceased being a right capable of legal protection from the moment of death. Therefore, merely to defame a deceased person cannot be a crime because dead people have no rights and can suffer no wrongs. The living alone can be the subject of legal protection. If it were possible to defame the dead, the conduct of the dead will never be brought into question; for example, it would not be possible to call into question the conduct of Hitler or the Yorkshire Ripper. Furthermore, an offence of defaming the dead would make it difficult to write history. The object of section 305(5) is publication about a dead person that is defamatory of specific living relatives of the deceased. This is actually a case of defaming not the dead but the living; the defamation is in reality an attack on a living person, but done under the disguise of attacking the dead.

What is protected under section 305 is 'honour or reputation', that is to say, character; and not disposition, which is merely a tendency to act in a particular way. In either case the offence must have been committed by means of "gesture, word or cry uttered in any place open to the public, or by any procedure intended to reach the public."⁷²⁹ This would suggest that what is contemplated here is the type of defamation known as slander (oral defamation), not libel (defamation in writing, picture or art form).

Slanderous and libelous defamation. But the expression 'by any procedure intended to reach the public' is so broad a term as to cover all mediums by which defamatory matter can be communicated. The effect of this is that

⁷²⁹ Section 305 (1) as read with section 152(1).

section 305(1)(5) covers both slanderous and libelous defamation. This eliminates the controversial question as to whether defamation over the radio, in a film or in a recorded song is libel or slander.

The traditional distinction in the law of torts is that slander is fleeting since the spoken words of defamation exist only as they are uttered and then disappear forever; while libel is permanent in that the documents in which the words appear continue to exist. The distinction is hardly conclusive because in some jurisdictions defamatory statements made over radio and television are considered libelous rather than slanderous even though the words are fleeting, which would be the case when uttered in a live broadcast.

The section does not cover the crime of defamation of business entities. Such an offence exists in some jurisdictions and is intended to protect the good will and credit of business firms⁷³⁰.

Communication of defamatory matter. The element of publication, that is, communication to the public, is conveyed by the words ‘open to the public’ and ‘reach the public’, and must be proved. The defamatory matter must thus be actually communicated to some person other than the person defamed. In *E.L. Woleta and M.N. Namata v. The Commissioner of Police*⁷³¹, the appellants, the owner and editor respectively of the *Cameroon Champion* newspaper, were convicted of knowingly and falsely publishing a defamatory article in their paper on 25 May 1962 and were each sentenced to 3 months’ imprisonment by the Victoria Magistrate’s Court. They appealed to the High Court of West Cameroon and lost. Per Gordon, CJ, “The totality of the evidence and the article itself prove every justification for the Magistrate’s finding of fact that the article in question was false and scurrilous and that it was likely to injure the reputation of Mr. Vincent Nchami, the Senior District Officer to whom it unmistakably referred.”

In *W.N.O. Effiom v. Mpame Ashu*⁷³², a civil case, the libel complained of was allegedly made in a circular letter by the defendant as ‘Secretary for the Ejagham Block Victoria’ during the Southern Cameroons Parliamentary election campaigns in 1961. The defendant was said to have made allegations of corruption against the plaintiff, Minister of Natural Resources and running for MP on the KNDP ticket, in furtherance of the campaign of one Mr. J.O. Takim, a prospective rival candidate for MP in the same constituency as the plaintiff. The court held that the letter was indeed defamatory. But in *Walter Mesumbe Wilson & 2 Others v. Anthony Ngunjob*⁷³³, another civil case, the

⁷³⁰ Cf. State of Louisiana Criminal Code, s. 47 (3).

⁷³¹ (1962-1964) W.C.L.R. 3.

⁷³² (1962-1964) W.C.L.R. 21.

⁷³³ (1965-1967) W.C.L.R. 24. See also Augustine N. Jua v. Fongum Gorji-Dinka & 2 Ors (1965-1967) WCLR 22; EML Endeley v. DM Frambo & J Talbot (1962-1964) WCLR 19.

allegation of libel failed. In that case, the respondent, a businessman and Organising Secretary of the KNDP political party, claimed damages against the appellants, editors and publishers of the *Citizen* newspaper, for libel. The libel complained of was published in an issue of the *Citizen* of 7 September 1965. The article in question read:

“Big News – Hot Time for KNDP – Ngunjoh in for Fraud Sources close to the Victoria Police say that Mr. Anthony T. Ngunjoh, Principal Organising Secretary of the KNDP has been reported to the police for alleged fraud by a French businessman Mr. Penziat. Mr. Ngunjoh also a businessman in Victoria and recently described by Vice President Foncha during a Decoration ceremony as an honest man, was said to have bought two tippers and two concrete mixers from Mr. Penziat but allegedly paid him with a false cheque to the sum of about two million francs CFA.”

The publication was held to be defamatory. On appeal, however, Kesiro and Mitchell JJ (Stewart CJ dissenting) held that the words were not defamatory in their ordinary meaning and that the respondent had failed to prove the meaning alleged in the innuendo.

Where the charge is that of defamation of the memory of a deceased person, the prosecution must prove not only that the defamation was intentional; he must also prove the specific intent on the part of the accused to injure the honour or reputation of the deceased's living heirs, spouse or universal legatee. The memory of a deceased is defamed if imputations are made about the deceased of facts, which the person making the allegations is unable to prove. It therefore does not necessarily follow that the honour or reputation of the deceased's living relatives is *ipso facto* injured by the mere fact that imputations have been made about the deceased. The memory of the deceased may be a bad one, as where he may have been a serial killer or rapist, or a notorious robber, or a sadistic killer, or a mass murderer; in which case there is no memory that would have been defamed if provable imputations were made about such facts.

Penalty. The ordinary penalty for an offence under section 305 is imprisonment for from 6 days to 6 months and/or with fine⁷³⁴. The penalty is halved for a defamation that is not public (section 305(6)), but is doubled for anonymous defamation (section 305(7)).

Prior complaint necessary for prosecution. A prosecution under the section cannot be commenced without the complaint of the injured party or of his representative by law or by custom (section 305(3). Furthermore, where the

⁷³⁴ Of from 5 000 to 2 million francs. Section 305(1).

complaint that triggered a prosecution under section 305 is withdrawn prosecution of the matter must be discontinued (section 305(3)).

Time bar for prosecution. Any alleged defamation under section 305 must be prosecuted within four months of the commission of the offence or of the last step in preparation or investigation thereof, failing which prosecution becomes statute barred (section 305(4)).

Defence. Truth or justification is almost always a perfect defence in the tort of defamation. This is so because freedom of speech is a cherished right. That right would not amount to much if people were not free to say things about others that are known to be true.

However, a statement about another may be true, but if it was made with the sole motive of hurting him the defence of truth might avail the maker of the statement nothing. For, the court might take the view that the behaviour of the maker of the statement amounted to a malicious use of true information.

Truth as a defence excluded in certain cases. In criminal defamation under section 305, truth cannot generally be pleaded as a defence. By section 305(2), no proof may be offered of the truth of a defamatory imputation where it (i) concerns the private life of the person defamed; or (ii) refers to a fact more than ten years old; or (iii) refers to a fact constituting an offence which has been amnestied or the conviction for which has been otherwise expunged. The exclusion of the defence of truth in these cases would seem to suggest that here the law irrebuttably presumes either falsity of the publication or actual malice (ill motive) on the part of the accused.

However, reasoning *a contrario*, it would seem to be the case that truth can be pleaded in defence where the imputation relates to a fact going back to not more than ten years, or where the imputation refers to a fact constituting an offence not amnestied or a conviction not expunged, or where the imputation relates to the public life of the person concerned, or where the imputation relates to a matter on the conduct of public affairs.

Fair comment. In the last two cases (public life of a person, conduct of public affairs) the defence would in effect be one of fair comment. The plea of 'fair comment' on a legitimate matter of public interest is now well established in the tort of defamation. In upholding that defence courts have held that public figures, such as politicians and other elected or appointed officials, must expect and accept a harsher degree of criticism about their conduct of public affairs than private persons. As public figures, their conduct in private legitimately comes under public scrutiny and censure as well because such a person's private life is more often than not likely to impinge on his conduct of public

affairs. Public officials enjoy the privileges and benefits that go with public office. It is only normal that they also take the burdens that go with such office.

Privilege. Another defence available on a charge of criminal defamation is that the statement or account is privileged. Certain publications, statements and accounts are privileged and so escape the law of criminal defamation. An absolute privilege exists in respect of what s. 306 denotes as ‘exceptions to defamation’, that is to say, defences to defamation. By that section, “the following shall constitute no offence”:

- Speeches within any legislative assembly, and any report or other document printed by order of any such assembly;
- Faithful accounts without malice of the public sittings of any such assembly;
- Proceedings in court and the speeches made and documents produced in court;
- Faithful accounts without malice of all such proceedings and speeches, save only of a prosecution or action for defamation;
- Publication of any judgment or judicial order, including those passed in a prosecution or action for defamation;
- An official report without malice by a person lawfully appointed to conduct an enquiry to the extent that it is germane to the enquiry;
- Imputations without malice by a superior on his subordinate;
- Information on any person given without malice to a third party having an interest, personal or official, in receiving it, or having power to remedy an alleged injustice;
- Criticism of any work of art, entertainment or opinion shown or expressed in public, provided that such criticism be not an expression of personal animosity;
- Any work of a historical nature and without malice.

The absolute privilege here granted to legislators and judges (counsel as well) is in accord with the immunity granted to them under relevant legislation (including the constitution) and generally known as parliamentary immunity⁷³⁵ and judicial immunity, respectively. The rationale for the grant of these immunities or privileges stems from the consideration that the public welfare is better served by an entire freedom of expression.

2.3. Abuse

Section 307 (1) punishes with imprisonment for from 5 days to three months

⁷³⁵ Cf *F.N. Eko v. Sam Mofor* (1971), Appeal No. WCCA/11/71, unreported, in which Hon. Sam Mofor, MP for Santa in the House of Assembly at Buea, claimed parliamentary immunity when he was charged with assault.

and/or with fine⁷³⁶ anyone who “uses without being provoked against any person in the circumstances of publicity described in section 152 any insulting expression, or contemptuous gesture or words, or invective without imputation of fact.”

The pith of this offence consists in the use of insulting expression, the use of invective, or the use of contemptuous gesture or words, against another person. An insulting expression would include insulting body language, insulting gesticulation, insulting sign, insulting sound (e.g. a derisive hiss, a contemptuous spit) or insulting facial expression (e.g. a disdainful look). The offence punishes the fact of insulting another in public. The tongue is perhaps the most powerful and dangerous part of the human body. The purpose of the law of abuse, as of the law of slander, is to keep the tongue in check, to tame its free use.

If the insult is not in public the behaviour constitutes a mere simple offence under section R. 366 (9) punishable by a niggardly fine. An insulting expression is a remark that offends the self-respect or modesty of another; invective consists of the use of strong words of attack; and words and gestures are contemptuous if they are scornful or insolent.

A separate and distinct offence is committed if the abuse is directed at the memory of a deceased person with intent to injure the honour or reputation of the living heirs, spouse or universal legatee of the deceased (section 307(4)). The penalty is the same as for the offence under section 307(1).

To sustain a charge under this section the prosecution must prove the exact insulting expression, or contemptuous gesture or words, or invective that the accused used. The prosecution must go further to show that the abuse was directed at a specified person and that it was public; and in the case of abuse directed at the memory of a deceased person the prosecution must prove the specific intent on the part of the accused to injure the honour or reputation of the specified living persons.

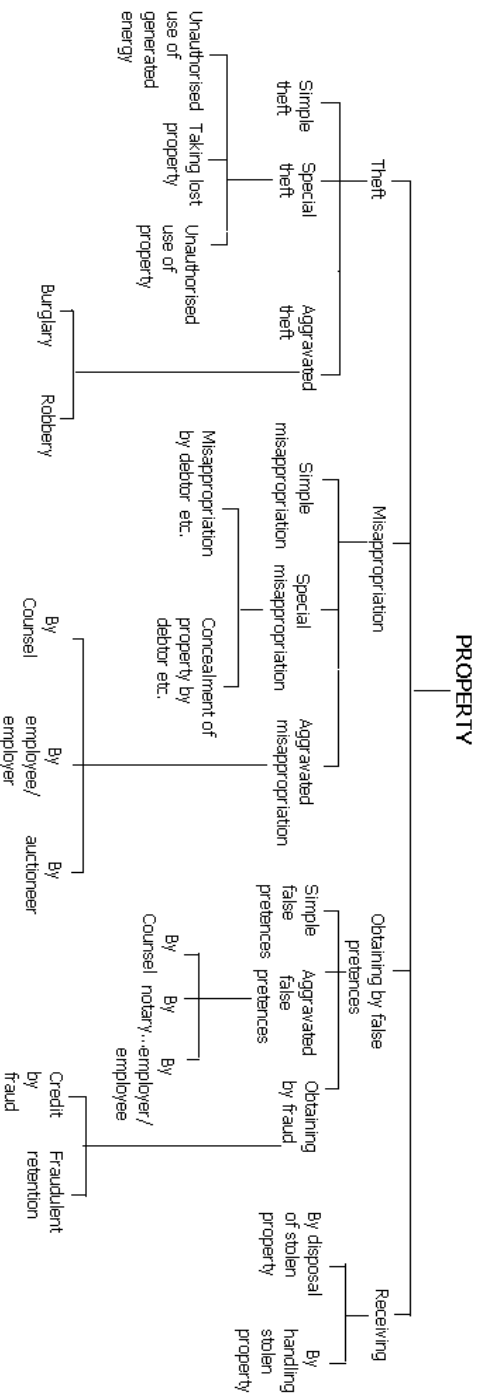
It is a defence to a prosecution for abuse to show that the accused was provoked into behaving the way he did. The onus to prove provocation lies with the accused. The prosecution may rebut evidence of provocation by showing that the accused was in no way provoked.

The comparative triviality of this offence is shown by the statutory requirement that the offence may only be prosecuted upon the complaint of the aggrieved party or his representative (s. 307(2)), and the further requirement that prosecution for the offence is barred by the lapse of four months from its commission or from the last step in its investigation (section 307(3)).

The rationale for punishing mere abuse is that it is harmful behaviour. It tends strongly to create or encourage a breach of the public peace. In some

⁷³⁶ From 5 000 to 100 000 francs.

jurisdictions the offence is prosecuted as a form of disorderly conduct or as conduct likely to lead to a breach of the public peace.



Offences against Property

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Offences against Private Property: Stealing

All societies recognize the fundamental notion that it is socially wrong to take in any fashion the property of another. The general societal disapproval of this type of conduct finds expression in the Code in the law against stealing. Accordingly, one can hardly imagine anyone, except he is a patient in a psychiatric hospital who does not know that stealing is regarded as wrong.

The Code maintains the old traditional threefold distinction between ‘larceny’ (re-cast as ‘theft’), embezzlement or conversion (re-named ‘misappropriation’)⁷³⁷ and cheating (now denominated ‘obtaining by false pretences’). Although these offences are dealt with separately they fall under the same section. Further, there is a certain overlap between them in that they carry the same penalty and there are two physical ingredients common to them. The common ingredients in all three broad types of offences are the requirements of ‘causing loss’, ‘to another’. A person suffers loss of something when he definitively ceases to have it, that is, he is permanently deprived of it. All the three ways (theft, misappropriation, false pretences) in which the wit of man has laboured to dispossess his neighbour are dealt with in one section with the same range of penalty for all three. The attitude of the Code in dealing with these offences in one section and in providing an identical range of penalty for all three appears to be that the means by which a man deprives another of his property is of secondary importance and that what is of primary importance is that in each case a man is dispossessed of his property.

§1. Theft: stealing by trespassory asportation

On the face of it the Code appears to have consolidated sundry theft-related offences into an omnibus crime denoted ‘theft’. In reality, there are three heads of the offence of theft, viz. simple theft (section 318(1)(a)), special thefts (section 319(1)(2)(3)), and aggravated theft (section 320).

1.1. Simple theft

A person is guilty of simple or ordinary theft within the meaning of section 318(1)(a) if he “causes loss to another by removing his property”. The prosecution must prove that **X** intentionally caused loss to **Y** by the intentional removal of **Y**’s property. The physical ingredients of the offence consist of (i) causing loss (ii) to another (iii) by removing his property.

⁷³⁷ ‘Misappropriation’ here (i.e. under s. 318 (1)(b)) relates to misappropriation of private property, which should not be confused with misappropriation of public property under s. 184. This latter offence is infelicitously denoted as ‘misappropriation of public *funds*’.

Loss caused. Unauthorised ‘borrowing’. It must be shown that a loss was caused. A person loses something if he is permanently deprived of it, that is, he ceases definitively to have the thing in question. This requirement removes from the ambit of the offence unauthorized borrowing⁷³⁸ of property, because in such circumstances the defendant does not intend to cause loss or a permanent deprivation. For example, if without authorization **X** takes **Y**’s bicycle or car for a joyride or for whatever, or if he takes for use any utensil or receptacle belonging to **Y**, intending to return it to **Y**, **X** cannot be convicted of theft under section 318(1)(a). That does not mean **X**’s conduct is condoned by the criminal law and that he will get away with it. The unauthorized use of any property without the intention to deprive the owner of it is an offence under section 319(2). The defendant would always claim he merely ‘borrowed’ the property even though he is unable to point to a voluntary lender. The fact is that people of low morality have always tried to cloak knavery with the language of legitimacy. The situation is not one of real borrowing but of a dishonest ‘swiping’.

In the ordinary run of theft cases the permanent loss caused would be to a person entitled to the property definitively. But under the section a loss caused to another entitled to keep the property only for a certain period of time might suffice to attract a conviction under the section.

Unauthorised taking with intention to return equivalent property. If the property taken without authority is wrecked, destroyed or otherwise damaged, a charge could properly be laid either under section 319(2) or under section 316 (destruction of property, if the accused intended to damage it or if he subjected it to substantial risk of damage). Supposing that **X** uses **Y**’s property (eats his food, drinks his bottle of wine, takes his \$100 note to play a lottery, etc) intending to pay for it or to return equivalent property and in fact does so, will **X** be saved from a theft conviction? A conviction under section 319(2) would be good since **X** had no authority to use the property. But a conviction under section 318(1)(a) would also be good on the sufficient ground that **X** did not intend to return the same property (i.e., exactly the same food, exactly the same bottle of wine, exactly the same one hundred dollar note he took). The law treats money differently from other chattels. If a person takes another’s money without authority but with intent to return the equivalent amount, he has nevertheless caused a loss to the owner of the specific notes and coins taken. The moment the taking took place ownership of the notes and coins immediately passed to the taker. The notes and coins taken cannot be returned *in specie*. The taker is guilty of theft.

⁷³⁸ Borrowing implies a consensual transaction, a taking from a voluntary lender. But the term is here used in the vulgar and dishonest sense to mean a temporary taking without permission.

Defence of honest claim of right. Since intention to cause loss must be proved, a defendant who honestly and reasonably (albeit wrongly) believes that he is entitled to the property cannot be guilty of theft. This is the defence of 'honest claim of right' and it is a credible defence because belief in legal right negates the requisite intent. Thus if a person believing himself to be a creditor takes the amount of money that he believes is owed him from the person he believes to be his debtor he can successfully avail himself of the defence of 'claim of right'. The defence is likely to succeed where subterfuge was not used, the act having been done openly; and where the defendant suggests some reasonable or genuine grounds for his belief. But suppose a man is owed money that the debtor refuses to pay. Should the creditor seize the debtor's wallet from him at the point of a knife and exacts the amount owing and returns the rest, would the defence of claim of right succeed? The high-handed exaction of due payment is illegal, but the behaviour in terms of property right is honest. The defence would succeed, though the taker may be guilty of assault or blackmail (obtaining with threats).

Ownership or possession of property in ignorance. What is the critical point in time at which it can be said that loss has been caused? Is it at the moment the defendant removes the property with the intention to cause loss? Or is it at the moment the victim cannot find his property? These questions are relevant in cases of lost-and-found property, and to the further question whether the victim must actually have knowledge of the fact that he has been deprived of his property.

Supposing that Marie Antoinette's servant takes away one of her several hundred pairs of shoes without her being aware of the taking, would that be theft on the part of the servant? Clearly that would be theft even though the owner of the property is not aware of the loss that has been caused. The reason is that it is not an ingredient of the offence that the owner of the property should actually know that he has suffered loss. The offence is consummated as soon as loss has intentionally been caused to another by the removal of his property.

A person may possess or own a thing in ignorance, that is to say, without being aware of its existence. A person possesses everything in his house even though he may not be able to itemize all of them. A person possesses the money in his bag or suit pockets even though he has completely forgotten about them. Indeed, in contemplation of the law a person can own property although he does not know it.

However, since the loss suffered could be permanent, it would seem to be the case that when **Y** demands the return of the property stolen from him and **X** who had stolen it does so, **X** can only be charged with and convicted of attempted theft.

Misplaced property. If **Y** misplaces his property and **X** who finds it decides to appropriate it to his own use rather than return it to its known or ascertainable rightful owner, **X** can be convicted of theft under section 318(1)(a). The reason is that when a person misplaces property he does not relinquish ownership or constructive possession. He does not abandon the property merely by giving up the search and giving up hope of ever finding it. It is still his. Consequently, a finder of the property who appropriates it (whether the intention to keep it was at the moment of the finding or later) causes loss to that person.

Lost property. The law is otherwise in the case of lost property. Property is lost when its owner relinquishes ownership or when its possessor relinquishes constructive possession. The finder of lost property who appropriates it commits no theft under section 318(1)(a) because there is no intention to cause loss and in fact the finder has caused no loss to another, the owner having already lost the property. The moment property is lost it becomes ownerless property, a *res nullius*. Consequently, a person who appropriates lost property is in the same position as a person who appropriates ownerless property. The fact that the property in question is lost or is ownerless saves the finder from a theft conviction under section 318(1)(a). But oddly, whereas the taking of lost property is punished as special theft under section 319(3), the taking of ownerless property is beyond the reach of the criminal law.

Removal of the property. Under the section, causing loss must have been by removing the property (including, of course, by causing the property to be removed). A destruction of the property *in situ* will therefore not be theft. In the ordinary run of cases, the loss would usually be caused by **X** himself removing the property. If **X1** and **X2** both remove the property in furtherance of an agreement to do so and thereby cause loss to **Y**, then **X1** and **X2** will be convicted as co-offenders (s. 96). But if **X1** ordered, facilitated or in any manner caused **X2** to remove the property thereby causing loss to the victim, **X1** is guilty of accessory to theft and **X2** of theft (assuming he had the requisite intent). If **X2** had no criminal intention then there is no guilty act in him and in the circumstances it would seem **X1** would not be guilty as accessory since there is no direct actor to which he can be called accessory. But it would seem courts are ready to treat the apparent accessory as the principal offender and convict him as such on the sufficient reasoning that **X2** was no more than an instrument. The situation is even the more so where **X1** uses say a child, a lunatic, or a trained animal to do the removing.

Value of the property. A final point to dispose of under this head is whether the property, the loss of which has been caused by the defendant, must be valuable property. Would it be a credible defence to a charge of theft to contend that the property in question was worthless? This can hardly be a worthwhile argument because what might appear in the eyes or estimation of the defendant as a worthless thing might in the eyes of the victim be a priceless antique. Causing the loss of a pin, a handkerchief, a leaf, a cent, or any trifle belonging to another by removing it, is theft all the same though a prosecution for such petty thievery would look unduly technical and oppressive.

Another. The term refers to any other person or legal entity. In most cases this requirement is obvious for, ordinarily, a person cannot steal from himself. This principle notwithstanding, the law has shown a practical necessity to contort itself so as to address certain situations deemed deserving of the intervention of the criminal law, such as inter-partnership thieving, inter-spousal thefts, and theft by owner (theft from another with a superior possessory interest). However, where, as between two persons it is unclear who exactly the owner of the property in question is, the court would resolve the doubt in favour of the accused by holding that this particular ingredient of the offence has not been established. In *The People & Mukum Frederick Acha v. Munji Marcus Tebit* (2008)⁷³⁹, Mukum Acha owned a piece of land adjacent to that of Munji Marcus. Both pieces of land are situated at Teko, Batibo and were acquired from one Fomuud, since deceased. Each person claimed to have developed his piece of land by planting eucalyptus trees that matured into timber. The evidence of Mukum Acha is that he felled 506 pieces of timber from his trees and that Marcus Munji came along and stole 400 pieces. His complaint to the police led to the arrest of Marcus Munji who was subsequently charged with theft under section 318(1)(a). The defence of Marcus Munji was that he was informed that someone had entered his land and had stolen timber whereupon he reported the matter to the police. A policeman accompanied him to the site from where 100 pieces of timber were collected and deposited at the police station. The trial court established from the evidence adduced in court and from its own observation when it visited the *locus in quo* that there had been protracted litigation between the two persons over ownership of the piece of land from where the trees were cut down and sawn into timber. The trial court then concluded that the crux of the matter was a land dispute between the two and so proceeded to dismiss the charge. On appeal, the learned justices of appeal (Morfaw, CJ, President, Nnoko, Fondjock, JJA, Vice Presidents) agreed with the trial court that the ingredients of the offence of theft had not been established and accordingly

⁷³⁹ Appeal No. BCA/MS/21c/2005, unreported.

upheld the dismissal of the charge. The Court however referred the land dispute to the Batibo Land Consultative Board for adjudication.

A similar decision was arrived at by the same Court of Appeal differently constituted. That was in the case of *Chi Angwafor Moses v The People* (2005)⁷⁴⁰. In 1977 government carved out part of Nzong village in Mankon, Mezam Division and ceded it to Ngen-Mbo village in Momo Division. Persons affected by this cession were required to either retain the piece of land they occupy and submit themselves to Ngen-Mbo jurisdiction or vacate the land and continue to be subject to Mankon jurisdiction and, in the latter case, would be entitled to compensation for loss of their property. Appellant claimed he occupied, by dint of inheritance from his father the late Fon of Mankon, a portion of the land area that was ceded to Ngen-Mbo. Tah Theophilus from Ngen-Mbo also claimed part of the same portion of land as property given to him in 1985 and on which he planted farm crops. He claimed that in August 1996, when he went to the farm in question he saw appellant, a lady and two children harvesting his yams and other crops.

The matter was subsequently reported to the relevant authorities. Following investigations into the matter, appellant was arrested, charged with theft of farm crops (yams, beans, cocoyams, palm nuts and avocado pears), the property of Theophilus Tah. He was convicted and given 5 years' imprisonment and ordered to pay 250 000 francs compensation to Theophilus Tah. On appeal, it was held (Njilele, Tume, Angyiembe, JJA, Vice Presidents), (1) that appellant and Theophilus Tah were laying rival claims over both the farm land and the crops thereon; (2) that appellant honestly believed that the farmland and the crops therein were his and equally accused Theophilus Tah of stealing his crops; (3) that by the circumstances of this case that the element of removing property belonging to another was negated and not proved beyond reasonable doubt especially when [it is remembered] that the appellant was occupying the land before it was ceded as part of Momo land. The Court accordingly set aside the decision and orders of the trial court and ordered that the dispute over the piece of land, which is unregistered land, be referred to the Mbengwi Central Land Consultative Board for adjudication.

Theft from a co-owner. It is trite law that an owner can steal from a co-owner. Two or more people may hold property in co-ownership (joint ownership or ownership in common). For example, property belonging to a members' club is held in co-ownership; husband and wife may have a joint bank account; all partnership property is held in co-ownership. In all cases of co-ownership, co-owners can steal from each other. When one partner causes loss to the partnership by removing partnership property he cannot escape a theft conviction on the ground that he had an interest in the property stolen.

⁷⁴⁰ Appeal No. BCA/MS/14c/2003, unreported.

The thieving partner would be rightly convicted of theft because his interest in the partnership property is a divided, and not an undivided, one. A partnership firm is not a separate legal entity; the relationship between the partners is personal; and the partners have divided interest in the partnership property. A businessman can even be properly convicted of theft from a so-called 'one-man company'. But it is not altogether free from controversy to hold an owner guilty of theft where he dishonestly takes his article back from a hirer, a bailee, or pledgee (pawnbroker).

'Theft' by spouses from each other. At one time it was thought that spouses could not steal from each other. Since the legal fiction is that husband and wife are one, quite naturally neither could steal from the other. Nowadays this rule is considered as a perpetuation of female domination and subservience. Some jurisdictions therefore reject it altogether. Others distinguish between household goods normally available to both spouses and the purely personal property of the other spouse. In the former case there is no theft, but in the latter case there is theft.

Regrettably the Code, in section 323, provides (amongst other things) that "section 318 ... shall not be applicable to a person guilty of the acts therein described against his spouse." A spouse guilty of stealing from the other cannot be punished, which is the same thing as saying that a spouse is free to steal from the other. This maintains the antiquated fiction that one spouse cannot steal from the other, whatever the nature or value of property involved. There may be cogent reasons for excluding the application of the law of theft between husband and wife, but only in cases of petty thefts of household articles. "It would obviously be unwise to use the criminal law for petty misappropriations of household articles by spouses. Spouses often contribute to a common fund, and it may not be clear what is whose; and a wife who runs the home may feel morally entitled to things that legally belong to the husband. Often it would be hard to prove dishonesty. As a safeguard, therefore, the consent of the Director of Public Prosecutions is generally required in these cases."⁷⁴¹

Possession. Theft is committed when loss is caused to another by removing his property. It is not only legal title (i.e., technical ownership) that is protected, but possession as well. Theft is thus an offence that may be committed against ownership, or against possession in certain circumstances. It is therefore possible to steal one's own property from another with a superior possessory interest. Supposing that **X** and **Y** have a genuine dispute as to ownership of a specific chattel, and in entering **Y**'s yard in the evening and removing the disputed property **X** thinks he is merely getting back what is his,

⁷⁴¹ G Williams, *Textbook*, p. 724.

X is nevertheless guilty of theft.

Other instances come to mind. **X** dishonestly takes his property back from **Y**, a pawnbroker (pledgee). **X** dishonestly takes his article back from **Y**, a hirer. **X** lends his book to **Y** and then goes and removes it. **X** takes his own car from **Y** knowing that **Y** has a lien over it. In either case loss has been caused to **Y** and **X** can be convicted of theft. **X** knows very well that he is breaking his contract with **Y** by taking the property back. He thus does not believe that he has in law the right to deprive **Y** of the property. He has caused loss to **Y** for the time **Y** is entitled to keep the property.

Similarly, a person can be guilty of theft by stealing property from another thief. The reason is that the first thief has possessory rights superior to all except the rightful owner and has thus suffered a loss.

By removing his property. Removal of a thing means the displacement, no matter how slight, of the thing from the place it occupied. The requirement of ‘removing’ connotes what used to be known as ‘asportation’, that is to say, carrying away. But in order to carry away there must first be a taking. ‘Removing’ therefore means taking and carrying away. Both a taking and a carrying away are essential. ‘Taking’ simply means laying hands on the property or doing something in relation to the property indicating an assumption of ownership or possession of the property. It is a usurpation of the right of ownership or possession over the property. If **X** goes to **Y**’s yard and lays his hands on **Y**’s bicycle, **X** has taken the bicycle. But there is no theft until **X** carries away the bicycle intending to cause loss to **Y**.

Supposing that **X**, seeing **Y**’s property on a table pretends to be its owner and sells it to **Z** who then carries it away himself. **X**’s conduct in selling the property is an assumption of ownership of it and is a constructive taking by him; **Z**’s carrying away of the property is a constructive carrying away by **X** because **Z** is no more than an innocent agent. The result is the same where **X** sends **Z**, a trained animal or a child or any unsuspecting person, to carry away and bring to him **Y**’s property thereby causing a loss to **Y**. The act of sending to go and fetch the property is a constructive assumption of ownership by **X**, and **Z**’s carrying away will be attributed to **X**.

Immovable property not capable of theft. The requirement that the property must be removed clearly suggests that under the section only movable property can be the object of theft. Section 318 (1)(a) thus restricts things capable of being stolen to be movable property, animate or inanimate capable of being the subject of ownership or possession. It follows that neither land nor any other form of immovable property can be the object of theft under the section. But, fixtures and things attached to the realty are capable of being stolen as soon as they are made movable, although they were made

movable in order that they might be stolen. If **X** chops **Y**'s tree and carries it away thereby causing a loss to **Y**, **X** is guilty of theft. The law is the same where **X** harvests **Y**'s fruits or crops, or where **X** removes fittings from **Y**'s house and takes them away. A document of title to land may be stolen. The charge should allege not theft of the land, which, because it is immovable is not theftous, but theft of the title deed. But if a trustee of land dishonestly sells or otherwise deals with the land in breach of the trust he may be charged with and convicted of theft.

Choses in action capable of being stolen. Choses in action are property rights that can be enforced only by bringing an action and not by taking possession. They include debts, shares, patents, copyrights, and trademarks. A chose in action is movable property and so is capable of being stolen. If a thing in action is wrongfully disposed of (e.g. assigned) or acquired, it would thereby have been stolen. A rogue who persuades a creditor by fraudulent means to assign book-debts to him is guilty of theft of the debts because the creditor is regarded as having property in the debt (as a chose in action) and can assign the debt to a third party. The notion of theft of a debt presupposes that the debt is in existence before the theft, so that a man who contracts a debt by fraud and then fails to pay does not steal the debt. But he may be liable under section 318(1)(c) for causing loss to another by false pretences.

Theft of a patent, a copyright or a trademark can occur when the whole patent, copyright or trademark is appropriated, as where the trustee of a patent wrongfully sells it for his own benefit. But this possibility is a little fanciful. A more practical point is the common case of infringement of patents, copyrights and trademarks. Such infringements are punishable as distinct offences under the Code (sections 327 to 330). The penalties are lighter⁷⁴² than the penalty for theft and so might be thought wholly inadequate. But there is provision for the confiscation of any equipment used, and of the illicit proceeds, the whole to be applied to the compensation of the victim. If A sells illicit copies of a CD recording and makes a huge profit, he is liable not only to imprisonment and a fine but will find himself having to fork out the entire illicit proceeds from the pirated CD because the law deems him a constructive trustee of the receipts on sale of the pirated copies.

Like a certificate of deposit, a promissory note, a bank draft, a cheque is a bill of exchange (a negotiable instrument) and is also capable of being stolen. Let it be supposed that **X** steals a cheque. Or supposing again that **X** is authorized to draw a cheque on the account of **Y**, and **X** without authority pays the cheque so drawn into his own account. In either case **X** may be charged with theft of the cheque or theft of the proceeds of the cheque. In

⁷⁴² Forging a trademark is the most severely punished infringement and it carries a maximum of three years imprisonment.

other words, the prosecution can charge him with stealing the cheque as a piece of paper (of the value of so much, since in law though the cheque is a piece of paper its value is that of the obligation that it embodies) from the drawer (the person who has the bank account) or other person from whose possession the cheque was taken. If **X** has cashed the cheque his theft occurred not when he stole the cheque but when he dishonestly appropriated the proceeds of the cheque (i.e. the cash).

Similar considerations apply in respect of shares. If the trustee of shares sells them for his own profit he steals the shares, because he deprives the equitable owner of the shares. But if a man burgles a house and steals a share certificate, he has arguably stolen a mere piece of paper and not shares. He could of course be charged with theft of the share certificate as a piece of paper with a par value (i.e. the face value assigned to a share and printed on the share certificate) since in law, as in the case of a cheque, though the share certificate is a piece of paper its value is that of the obligation that it embodies.

Industrial espionage seems beyond the reach of the law of theft. Consider the following cases. An employee, a computer wizard, unlawfully extracts secret information from a computer and passes on the information so obtained or improperly makes a profit from those secrets. A man improperly copies a document and then returns it. An employee sneaks into an office when the rest of the employees are having a meeting and takes photographs of documents without removing them. An industrial spy uses deception to get confidential information from an employee. Conduct such as these relate to industrial or trade secrets, which is a subject not covered by the Code. “Such secrets are often immensely valuable, are legitimately bought and sold, and for some purposes are treated as property. But almost certainly they would not be regarded as property for the purpose of theft. An employee who in breach of contract communicates his employer’s secret know-how to a third party does not deprive the employer of the information, and it would be far-fetched to describe him as appropriating the secret. How can you steal a fact?”⁷⁴³

Human being not theftous. A human being is not property and so is incapable of being stolen. What used to be known as ‘child stealing’ is now punishable as kidnapping under sections 352 – 354 of the Code.

Regarding the human body, the general principle in law is that a person does not own his own body while it is intact. *Dominus membrorum suorum nemo videtur* (i.e. a person does not possess his own body either). If a person does not own his body when he lives, then it follows that when he dies the body cannot be owned. Hence the traditional rule that there is no property in a corpse. Supposing that a body is snatched, or parts of a corpse are severed, and sold to a medical school for use in the teaching of human anatomy. Would

⁷⁴³ G Williams, *Textbook*, p. 688.

that be theft? It is doubtful. But the Code punishes ‘violation of corpse’ in section 274. Now, supposing that a man’s finger is severed and taken away for some ritual ceremony, or a lady’s three-inch nails are cut while she is deeply asleep and sold to a manicure beauty salon, or suppose the dreadlocks of a Rastafarian are cut while he is in deep marijuana-induced slumber and sold for wigs. Would that be theft? A more practical point is whether harvested or donated body parts, such as blood, semen, transplant organs and the like, and stored in a ‘bank’ are stealable. On principle they should be. But the law is still very obscure on this matter.

Generated energy and animals. Generated energy (gas, water, electricity, solar energy), lost or abandoned property, and *furtum usus* (unlawful use of animal or any conveyance without the consent of the owner) are all punishable under section 319, which contains special provisions relating to ‘special thefts and misappropriations’. Every tame animal and every animal wild by nature but kept in confinement (in a den, cage, sty, tank, or other small enclosure, or in a zoo or park), which is the property of any person, is capable of being stolen. But wild animals in the enjoyment of their natural liberty are not capable of being stolen because they are ownerless. Wildlife legislation may however prohibit hunting or poaching or fishing of certain animals. Where a hunter kills an animal in the wild he becomes the owner thereof; the dead body of the animal is capable of being stolen. Everything produced by or forming part of the body of an animal capable of being stolen is capable of being stolen. The term ‘animal’ includes fish and bird.

Partial statutory defence. Section 323 provides that the law of theft “shall not be applicable to a person guilty of the acts therein described against his spouse, against his legitimate or adoptive or adopted ascendant or descendant, or against his natural ascendant or descendant up to the second degree either living with him or after recognition, or to a surviving spouse in respect of necessities belonging to the deceased spouse.” In any of these cases the thieving relative may of course be prosecuted and convicted. But he will, by virtue of this section, get an absolute discharge. Practically this means no useful purpose can be served pressing charges against a relative who has stolen from another relative, a spouse who has stolen from another spouse, or a widow/widower who has stolen necessities belonging to the deceased spouse.

Penalty. A person convicted of simple theft is liable to imprisonment of from five to ten years and a fine.

1.2. Special thefts

Section 319 punishes as special thefts: the unauthorized appropriation of any

generated energy; the unauthorized use of any property, without the intention to deprive the owner of it (e.g., a cell phone, a seasonal bus or train pass); the taking of lost property. These are ‘special thefts’ because in truth there is no stealing as the requisite theftous intent is lacking in all these cases. They are all cases in which although the defendant acted dishonestly there was nevertheless no intention to cause a loss. In fact, appropriating generated energy, using and returning another’s property, or taking lost property are generally not seen by the ordinary man as conduct occasioning loss to anyone. Moreover, in the case of generated energy, electrical power is not and cannot be made movable and so is not capable of being stolen.

The term ‘generated energy’ is not self-defining. But it would seem to cover water, gas, and electricity. Gas may be stolen once it is made movable, and gas of any kind in a pipe or container (gas bottle) may be stolen. Water abstracted without an implied licence, or in excess of it, is stolen. Water in a pipe or otherwise reduced to possession for sale or use may certainly be stolen, and the same would appear to apply to water in a well, though where a well or a public tap water is provided for public use free of charge, the water would not be stolen unless it was taken for some unauthorized purpose, e.g. where water from a well or public tap provided for personal use is taken for watering animals, or for some commercial or industrial use. Electricity does not appear to be movable, but the fraudulent appropriation of power is an offence. Although not expressly mentioned in the section since it was drafted well before the Internet age, cellphone/Internet airtime (i.e. the money value of talk time or Internet access time bought from the relevant service provider) may be stolen. If P charges his cell phone with 500 francs worth of credit airtime and B, without A’s permission, uses the phone and exhausts the 500 francs credit in it there is no good reason why B may not be convicted of having stolen the equivalent of that amount. It is likewise where another’s airtime credit card or coupon is removed and used.

A person charged with an offence under section 319 may invoke the partial defence available under section 323. The latter section provides that section 319 (as well as sections 318 and 322) “shall not be applicable to a person guilty of the acts therein described against his spouse, against his legitimate or adoptive or adopted ascendant or descendant, or against his natural ascendant or descendant up to the second degree either living with him or after recognition, or to a surviving spouse in respect of necessities belonging to the deceased spouse.”

The penalty for an offence of ‘special theft’ is the same as that for simple theft.

1.3. Aggravated theft

Aggravated theft is committed within the meaning of section 320 when a

person steals (whether by day or by night) by using violence or by gaining unauthorized entry into property. This means the theft must be accompanied by any of those circumstances. It is immaterial whether the theft was committed in the day or at night. But the violence must take the form of the use of physical force or a weapon or a motor vehicle.

Theft by violence: the use of force. Under section 320(1)(a) it is aggravated theft to steal by day or by night ‘with force’. ‘Force’ here must be construed as including both physical and psychic force. Using psychic force, such as threatening or frightening the victim, and then stealing from him is punishable in other jurisdictions as a distinct offence of theft by *extortion* or *blackmail*. Not so in this country. Theft by extortion or blackmail is punishable here as a form of aggravated theft.

Where physical force is used in stealing the conduct is punishable in other jurisdictions as a distinct offence known as *robbery*. There is no such offence *eo nomine* in this country. Under the Penal Code robbery is punishable as a species of aggravated theft. When physical force is used in stealing, the kind or amount of such force is immaterial. The application of any force, directly on the person stolen from or indirectly on another, suffices: touching, striking, nudging (e.g. so that the person loses his balance and then his wallet is stolen while he is thus unbalanced), pushing, kicking, blowing, restraining the victim by seizing his arm or body or by pinning him down or by tying him with a rope, knocking him down, preventing or overcoming conscious resistance by the victim such as a tug-of-war with him or applying a chloroform pad to his nose, severing an article attached to the victim such as breaking a watch-chain or a cell phone rope or an arm or neck piece of jewelry or causing injury such as tearing an ear-ring from the lobe of the ear.

However, not all theft from the person is aggravated theft; otherwise there would be no distinction between ordinary theft and aggravated theft, which is obviously not the intention of the lawmaker. Accordingly, the kind of force required in the case of aggravated theft must be something more than the sort of slight exertion of strength used by a thief to lift the victim’s wallet by stealth from his pocket. It must also be something more than the sort of gentle force used to snatch an article by stealth or surprise. If a thief twitches a handbag from a lady caught unawares, or snatches a brief case from a car with windows down at a red traffic light, that should not be aggravated theft. But tugging the handbag or briefcase away when resistance is offered should be. Accordingly, a skateboard or bicycle or motorcycle rider who wrenches an article from an ambulatory trader or from a street vendor or from a black marketeer and escapes would be guilty of aggravated theft.

These propositions of law notwithstanding, in one case a conviction for aggravated theft was upheld even though none of the circumstances of

aggravation specified in section 320 (1)(a) appears to have been explicitly stated in the case. The case in question is *Adamu Buba, Hamidu Adamu & Yerima Issa v. The People & Nebane Shadrack Shu* (2008)⁷⁴⁴. Appellants and three others were convicted by the Mezam High Court of several offences, including that of aggravated theft contrary to section 320(1)(a)(new). They were sentenced to various jail terms and adjudged jointly and severally liable to the civil claimant to the sum of 10 420 000 francs. The facts of this cattle theft case are straightforward. Nebane Shadrack Shu kept cattle in Bukari, Bafut. Yusufu Magaji took care of a herd of cattle in the same neighbourhood where Nebane's cattle grazed under the care of Hadji Karero. Twice in 2000, Nebane's cows (one on each occasion) got missing and on each occasion the cows were traced among the cows under the care of Magaji who pleaded to theft each time and promised compensation to Nebane. On 3rd February 2003, Nebane's entire herd of 22 cows went missing. He hired various persons to search for the missing herd. The cows were eventually located at Fundong and a complaint filed with the local prosecutor. A number of suspects were rounded up and eventually charges were filed against six, five of who were subsequently convicted. Of the five persons who were convicted, three appealed. The conviction of the appellants was based on the incriminating evidence of a lone accused found by the Court to be of doubtful character and whose evidence the court also found to be unreliable in that his statement made before the trial was inconsistent with his testimony at the trial incriminating the first two appellants. The appeal succeeded in respect of 1st and 2nd Appellants but failed in respect of 3rd Appellant found by the court to have been at the centre of the organized cattle theft. The Court (*coram*: Mboh, Fonjock, Mbaki, JJA, Vice Presidents) therefore upheld the trial court's conviction and sentence of Yerima Issa to 5 years' imprisonment. Further, he, together with Yusufu Magaji and Barbuma Musa (the two convicts who had not appealed the decision of the trial court) were adjudged jointly and severally liable to Nebane Shadrack Shu in the sum of 10 420 000 francs.

Theft by violence: use of a weapon. It is aggravated theft within the meaning of s. 320 (1)(b) to steal by day or by night 'bearing weapons'. Again this is an offence of robbery. A weapon is any instrument, which from its common use for such a purpose or from the particular circumstances of the case is used to inflict injury to the person.

Bearing a weapon means carrying a weapon. The weapon must be visibly borne (i.e. displayed) for the provision to be meaningful. The requirement that the weapon be simply borne would seem to exclude the necessity of proving that it was used. Of course bearing a weapon is intended to serve a purpose and in that sense it could be said that bearing of the weapon amounts to using

⁷⁴⁴ Appeal No. BCA/7c/2007, unreported.

it. But in that case the ‘use’ simply amounts to conveying a threat by conduct and therefore psychic force, a point already alluded to and which would be superfluous under section 320(1)(b).

It is submitted that mere visibly bearing a weapon and then committing theft would amount to aggravated theft. However, in practice in theft cases involving weapons, the instrument is invariably put to effective use. If aggravated theft is committed the moment one steals when merely bearing a weapon then, *a fortiori*, aggravated theft is committed when a weapon is actually used in order to steal. Thus, if a person uses a weapon against another and then steals from him or does so while stealing from him, he would have committed aggravated theft. A person is likewise guilty of aggravated theft if he uses any *weapon* (e.g. an explosive substance, a gun) to blow open the entrance into or make a manhole on the wall or ceiling of a house or building and then goes in and steals, or to blow open a safe and steals there from.

Theft by violence: use of a motor vehicle. Any person who commits a theft by day or by night ‘with a motor vehicle’ is guilty of aggravated theft under section 320(1)(d). A theft is capable of being committed ‘with a motor vehicle’ in one of two ways. (i) The thief who is in a motor vehicle with windows down and being slowly driven snatches the property of some other road user and speeds off. (ii) The thief uses a motor vehicle to get to the place of intended commission of the theft, steals therefrom, puts the stolen items into the vehicle and then drives off. In *Bimela Francis v. The People* (1988)⁷⁴⁵, the appellant who stole 14 bags of coffee using a motor vehicle was convicted of aggravated theft. The conviction was confirmed on appeal. But there is no aggravated theft where a person commits a theft and then escapes in a get-away vehicle. In the law of aggravated theft by use of a motor vehicle, the motor vehicle must be used for stealing, not after stealing.

A motor vehicle is a conveyance propelled by an engine. A bicycle is not a motor vehicle. A hang-glider is not. A skateboard is not. A plunderer who empties a house, loads a motor vehicle with his loot and then drives off is guilty of aggravated theft. Also guilty of aggravated theft is the thieving biker who rides past a lady, snatching her handbag or her shopping bag full of groceries, and disappears. But the cyclist, the balloonist, the hang-glider, or the skateboard rider who snatches an article from his victim is not guilty of aggravated theft. The bicycle, the balloon, the hang-glider, and the skateboard do not have an engine.

Theft by unauthorised entry: breaking in, climbing in. Section 320(1)(c) punishes as aggravated theft also anyone who commits a theft by day or by night ‘by breaking in, by climbing in, or by use of a false key’. This species of

⁷⁴⁵ Criminal Appeal No. BCA/12.c/88, unreported.

aggravated theft is a distinct offence in other jurisdictions and is denoted as *burglary*.

In the law of burglary it is immaterial how the breaking in or the climbing in was carried out. Where the thief used a weapon to break in or to climb in the charge should be laid under section 320(1)(b). Section 320(1)(c) says nothing about unauthorized entry by way of opening (e.g. an unlocked door) or lifting (e.g. a flap) or melting down (e.g. a steel or glass door). But it would be astounding if it were held that any of these acts does not constitute a breaking in. In *Zebaŕe Pierre v. The People* (1986)⁷⁴⁶, the Court of Appeal confirmed the conviction of the appellant for aggravated theft. The appellant forced open the window of a house, climbed through it into the house and stole therefrom the paltry sum of 35.000 francs. The Court of Appeal in *The People v. Jeremiah Ngum Njab & Akaragwe Apana Klaus*⁷⁴⁷ also confirmed the conviction of the 1st Respondent for aggravated theft by breaking in and that of the 2nd Respondent by receiving.

There is also an unauthorized entry by 'breaking in' or by 'climbing in' not only when the burglar's whole body is inside the building or part of it, but also if only part of his body is inside. There is thus an entry if he is seen half inside a shop window, rummaging inside. A smash-and-grab raider enters a shop or house when he inserts a hand or an instrument such as a hook to extract an object through the shop window or to grab goods. But whether an intrusion constitutes an entry is not clear. Suppose that the accused's fingers are inserted through a gap between a window and its frame in order to open a window. That would at least be attempted entry. But the act by itself cannot possibly be interpreted as unambiguously indicating an irrevocable intention on the part of the accused to commit burglary or aggravated theft.

In *The People v. Asobo Teneng George & Achu Ernest Moma* (1986)⁷⁴⁸, the complainant, owner of a shop on Commercial Avenue in Bamenda, locked it up with two padlocks at the close of the day's business, and requested the night watchman of a nearby bank to keep an eye on the premises. The following morning, when the shopkeeper went to the shop he found the locks had been tampered with. One of the locks was unlocked and was hanging on the door; the other lock lay in a gutter nearby. When he flung the door of the shop open he found the 1st defendant inside the shop with various articles, which he had collected to take away with him. Evidence at the trial showed that the 2nd defendant had been outside the shop keeping watch and should normally have removed the lock, which still hung on the door, upon being signalled to do so by the 1st defendant from inside the shop.

It was held that the charge of attempted aggravated theft failed. The court

⁷⁴⁶ Suit No. HCB/186.c/86, unreported.

⁷⁴⁷ RCD No. 2, 1985, p. 101.

⁷⁴⁸ Suit No. HCB/5.c/86, unreported.

reasoned that the essential ingredient of breaking in had not been proved beyond reasonable doubts. It observed that the defendants might simply have found the door unlocked by another person who probably developed cold feet and abandoned his plan to steal from the shop. The 1st defendant could then have probably entered the shop without breaking in. He was found inside the shop, meaning there was no breaking out which, arguably, could possibly have been construed as amounting to a constructive breaking in, especially as s. 320 (1)(c) makes no mention of 'breaking out' presumably on the assumption that a burglar who breaks in would also inevitably 'break out' in order to get away. It would be insufficient and contrary to principle, said the court, to hold on the facts of the case that aggravated theft or attempted aggravated theft had been committed.

The decision rested on the well-known principle that the prosecution must prove its case beyond reasonable doubt and that the accused gets the benefit of any doubt created in the mind of the court as to his guilt. However, although there was clearly a sufficient doubt on the question of aggravated theft or attempted aggravated theft, it cannot credibly be argued that there was no attempted simple theft. It is submitted that the facts elicited at the trial proved beyond reasonable doubt the commission of attempted simple theft and the court should have convicted on that lesser offence on the theory of 'lesser included offence'. This was done in *The People v. Njob Lobe & Enow Gregory Tanyi* (1987)⁷⁴⁹. In that case the accused were indicted for aggravated theft but no offence was proved at all against the 1st accused, while only simple theft was proved against the 2nd accused and was thus convicted of it. Similarly, in *The People v. Noutadiowo Njamgur Thomas & Nguanje Victor* (1987)⁷⁵⁰, where the indictment was aggravated theft but the prosecution was only able to prove that the accused were found with stolen goods Ngayi J convicted them of the lesser offence of receiving.

Theft by unauthorised entry: use of a false key. A false key is an imitation or a fake of the original key. A false key is also an unauthorized use of the original key, an unauthorized use of a copy of the original key, or an unauthorized use of a lost and found original key or copy of it.

In *The People v. Tsangué Jean-Marie* (1983)⁷⁵¹, the accused stole a refrigerator from premises he had gained access into using a key determined by the court to be false. He was convicted of aggravated theft. Mr. Justice Anyangwe, the Judge in that case, made the clearest statement yet on the law relating to a false key. In the opinion of the learned Judge a key is false when it is not the usual

⁷⁴⁹ Suit No. HCF/10.c/87, unreported.

⁷⁵⁰ Suit No. HCF/21.c/87, unreported.

⁷⁵¹ Suit No. BCB/20.c/83, unreported. See also, *The People v. Ambe Martin* (1987), Suit No. HCB/2.c/87, unreported.

key used by the occupier and members of his household for opening the door and the person using it had no authority from the occupier of the house or his agent to use that key in opening the house. Applying this statement to the case before him, the Judge said, "Since the said key was not the usual key for the door, and since the defendant had no authority either from the prosecutor [complainant] or [his agent], the use of the key in opening the house ... was in the circumstances a false key within the meaning of section 320(1) of the Penal Code."

If a person has authorization to use the key in opening the house the key is not false. But if the authorization is abused, as where the key is used for an unlawful purpose, the key becomes false. A person who is authorized by the occupier of a house to use a key to enter the house for a legitimate purpose, but who intends to steal therefrom constructively converts the key, by his theftous intent, into a false key. His entry becomes in excess of his permission and he becomes a trespasser. His stealing from the house becomes aggravated theft. In the English case of *Jones and Smith*⁷⁵² it was held that a man who had permission to enter his father's house entered it as a trespasser when he entered it to steal his father's television set because he entered in excess of his permission. Also, a lost key found and used by a burglar to enter and steal from a building is also a false key.

Permission to use a key may be given for a particular purpose or purposes and only by the occupier of the premises or someone acting with his authority, or a member of the occupier's household acting without his authority. A permission to enter may not necessarily extend to every part of the house. A person may lawfully enter a building, such as a hotel, a shop, but trespass on the cashier's office or the stockroom or the kitchen or the bar or the laundry room. Equally, a person may be a lawful guest at a meal but trespass in a bedroom, or he may be authorized to use the key to enter the guest room or the children's room, but he uses it to enter the master's bedroom. The same would apply where permission to use the key was given to a person under a mistake as to his identity induced by fraud. In these examples, the key becomes false once it is used to gain access into unauthorized places.

Nota bene. First, in the law of aggravated theft the impugned conduct (violence or unauthorized entry) must precede or be contemporaneous with the commission of the theft. In other words, the violence or the unauthorized entry must take place immediately before the theft or at the time of the theft. If, in order to enable his escape, the thief, after stealing, uses violence (e.g. shoves aside or knocks down a person trying to prevent his escape) or enters someone's property without authority (e.g. in an effort to hide from pursuers), there is no aggravated theft. The offender should be charged with three

⁷⁵² [1986] Crim LR 167.

offences, simple theft, assault, and invasion of residence.

Secondly, the crime of aggravated theft is consummated when there is a violent or unauthorized entry followed by stealing. The mere insertion of a false key, the mere breaking of the door or window without the intrusion of any part of the body, or the mere climbing in or other intrusion of the body, without stealing from the house or building does not constitute aggravated theft. Where a house is surrounded by a wall (whether a hedge, steel, brick, stone, or barbed wire fence) and a person uses a false key to open the gate or climbs in, he will be guilty of aggravated theft only if he then steals something in the yard of the house (any article lying in the yard, laundry hung on the line to dry, veggie or flowers or other crops in the garden). But if he steals nothing from the yard and uses a false key to enter into and steal from the house his climbing in over the fence or entry through the gate using a false key would be considered as merely facilitating access into the premises for the purpose of breaking into the house or entry into it using a false key and stealing therefrom.

Thirdly, there is no requirement under section 320(1)(c) that the climbing in, breaking in, or use of a false key must be in connection only with a building or house. It may be argued that though such a requirement is not explicitly stated it is nevertheless implied, and that cases that have come before the courts concern thefts from homes or buildings. Still, the formulation of the offence is such that a person can properly be convicted of aggravated theft of property from a place other than a home or building. If a person uses a false key to open and steal from my fridge, freezer or car in my open garage or car port there is no reason why he may not be convicted of aggravated theft. If he steals from my container, trailer, kiosk or caravan by climbing in or breaking in there is no reason why he may not be convicted of aggravated theft. And if he finds the door of my house, office or shop wide open either due to my negligence or following a prior arrangement between him and my employee to ensure that the door is left ajar, and he enters and steals property which he then loads onto a motor vehicle and drives off, there is no reason why he may not be convicted of aggravated theft.

Conflation of robbery and burglary. Section 320 conflates two distinct offences denoted in other jurisdictions as robbery (stealing by using violence) and burglary (stealing by breaking and entering into a house or any building).

Penalty. The penalty for aggravated theft used to be death but is now imprisonment for a maximum term of 20 years and a fine. However, where death or grievous bodily harm is caused in the course of committing aggravated theft the offender becomes liable to the death penalty. The justification of the death penalty in this case appears to be that although the

killing may not have been intended, least still premeditated, it results from a grave unlawful activity, which is the intentional commission of a felony.

In view of the severity of the penalty for aggravated theft courts are slow to convict for the offence where discrepancies appear in the evidence of prosecution witnesses or where the circumstances of aggravation of the theft are not proved beyond reasonable doubts. In *Mathias Tantoh Naseh v. The People* (1973)⁷⁵³ the appellant was charged with breaking a dwelling house and stealing from it two overcoats. There was no direct evidence to support the charge. No one saw the appellant either break-in or out of the house. No one saw him remove the overcoats from it. The Bamenda High Court relied on circumstantial evidence. It drew the inference that the appellant was the one who committed the offence. He was accordingly convicted of aggravated theft and sentenced to death, which was the mandatory sentence for the offence at that time. The prisoner appealed. Held, by the Bamenda Court of Appeal (Thomas, CJ, Ekor-Tarh and Tatabod, JJA), allowing the appeal and quashing the conviction and sentence, that given the contradictions and discrepancies in the evidence by the prosecution witnesses the prosecution failed to prove its case with the degree of certainty commensurate with the gravity of the offence, and that the evidence as a whole, which was circumstantial, suggested the possibility of some person other than the appellant who might have committed the offence.

The Buea High Court also declined to return a verdict of guilty of aggravated theft in a case where the court found the evidence to be too weak and unreliable to convict any man upon it. This was in the case of *The People v. Mathias Ncho* (1973)⁷⁵⁴. In that case **X**, the complainant, padlocked the door of his house and went and spent the night elsewhere. When he returned the following morning his door had been broken into and his room burgled. He noticed that a number of articles were missing. He raised no alarm. The matter was however reported to the Police. About eleven days later **Y** was seen wearing a jacket listed as one of the articles stolen from **X**'s house. **Y** was arrested and he said he had bought the jacket from the accused. The accused was arrested and a search of his home resulted in the discovery of many stolen articles, including those stolen from **X**'s house. He was charged with aggravated theft. The case for the defence was that the elements of aggravated theft had not been proved against the accused beyond reasonable doubts; that the evidence of the prosecution witnesses was for the most part vacillatory, contradictory and fraught with personal ill-will towards the accused; and that the prosecution "left a chasm of doubt in their case impossible for justice to cut across or bridge."

Niger-Thomas, J found that the only evidence of breaking into **X**'s room

⁷⁵³ (1970-73) UYLR 125.

⁷⁵⁴ (1970-73) UYLR 149.

was given by **X** himself who did not call anyone to witness the damage to his lock before entering into the room, and that this evidence was too weak and unreliable to establish, beyond all reasonable doubts, that **X**'s home had been broken into. But the learned trial Judge relying on section 148(a) of the Evidence Ordinance stated that the accused had failed to produce satisfactory and convincing evidence of his title to the articles found in his possession and therefore held that the accused must be presumed to have stolen the said articles. The accused was found guilty of simple theft and sentenced to 10 years' imprisonment.

1.4. Receiving

The crime of receiving (known in some jurisdictions as '*handling*') punishes helping the thief after the theft. It is committed where a person *holds* or *disposes* of anything procured by the commission of a misdemeanour or a felony, *whether knowing or having reason to suspect the criminal origin of the property* (section 324). In *The People v. Grace Nyoh & Achu Marcus* (1985)⁷⁵⁵, Mbuagbaw J convicted the defendants of receiving, as charged, and sentenced each of them to 2 years' imprisonment after accepting mitigating circumstances pleaded in their favour.

Two offences of receiving. Section 324 creates two offences of receiving, namely, holding of property and disposal of property, obtained by means of an act constituting a felony or a misdemeanour. Both cannot be charged in one count because the action verbs used indicate a different mode of commission. A receiver may hold stolen property without disposing of the same; and he may dispose of stolen property without handling it as where he simply makes a phone call to a 'customer' to pick up the 'merchandise' from a particular place. There should therefore be separate counts either for receiving by holding or for receiving by disposing, as the circumstances require, or for both if the defendant held and disposed of the stolen property.

It must be shown that the property in question was obtained by means of an act constituting a felony or a misdemeanour. A person can thus not be convicted of an offence under s. 324 if he holds or disposes of property procured by means of the commission of a 'simple offence', or a fortiori, if the property was obtained by means of an act that does not constitute an offence at all. Supposing that a child under the age of 10 years living with his parents *de facto* steals property belonging to them and gives it to A, who knows how it was obtained. A is not guilty of receiving because *de jure* the property was not stolen as a child of less than 10 years of age is, by virtue of s. 80 (1), *doli incapax* i.e. incapable of committing an offence. Different considerations apply in the case of a spouse who takes property from the other and gives it to A, who

⁷⁵⁵ Suit No. HCSW/8.c/85, unreported.

knows how it was obtained. There, theft has been committed and A is guilty of receiving. Section 323 exempts the thieving spouse from punishment, not from guilt; the conduct remains an offence for which the spouse can be convicted, though he/she will escape punishment on account of the s. 323-immunity.

Receiving by holding. A thief may give stolen property to another to hold it. Usually this is done to hide the stolen property or to allow for a ‘cooling off’ period before disposing of the property. The handler is guilty of receiving even if there had been no prior arrangement or agreement for the handler to receive the property. The handler ‘holds’ the goods the moment he takes possession or control of them, whether alone or with the thief or with another person. Furthermore, a person may ‘hold’ by authorizing his agent to receive, or by having goods delivered to his premises. Actual physical possession of the goods by the defendant is thus not necessary for the completion of the offence; it is sufficient if there is constructive possession as where the handler holds the goods through a person over whom he has control (such as a servant or other agent), so that they would be forthcoming if ordered.

Where a person buys stolen property (knowing or having reason to believe the property to be stolen) he can be convicted of receiving by holding. There is no requirement in the section that the receiver must hold on behalf or for the benefit of the thief or someone or other.

On principle, nothing bars charging both a husband and a wife as handlers.

Receiving by disposal. A person is also guilty of receiving where he disposes of stolen property. Disposal covers all kinds of conduct that assist the thief or other person in dealing with the goods, e.g. by unloading the goods from a lorry, or by changing ‘hot’ money for ‘cool’ or safe money, or by converting the stolen property into other property as where a stolen car is ‘broken’ into spare parts or stolen product is converted into another product. But if A steals a sum of money which he uses to buy a bicycle for B who receives it knowing the full facts, B cannot be convicted as a receiver within the meaning of section 324 because the bicycle was not procured by the commission of an offence. It cannot be convincingly argued that because the bicycle was the ‘fruit’ of the stolen money it had also become tainted with the theft and that therefore by receiving the bicycle with full knowledge of the facts, B became liable as a receiver. The section is clear and unambiguous and does not admit of such a convoluted interpretation.

The usual method of disposing of stolen goods is by helping to sell them. Thus the professional receiver, known in the underworld as a ‘placer’, who finds buyers for stolen goods without touching or even seeing them, can

properly be convicted under the section⁷⁵⁶.

Section catches the ‘fence’. The person caught by the section is not the thief but the receiver of the stolen property, that is to say, the person who holds the tainted property or who disposes of the tainted property. In slang language such a person who deals with stolen property is called a ‘fence’. If **A** holds property procured by means of the commission of an offence characterized as a felony or a misdemeanour he is as guilty of receiving just as **B** who disposes of property procured by means of the commission of an offence. If **D** bought the stolen property knowing or suspecting it to be tainted property, he can be charged with and convicted of accessory to receiving by disposal.

‘Receiving’ under section 324 may be conceptualized as a kind of aggravated ‘accessory after the fact’⁷⁵⁷ as distinguished from what might, in a flight of pedantry, be denoted as ‘accessory before the fact’ (section 97(1)(a)) and ‘accessory before and during the fact’ (section 97(1)(b)).

Knowledge or suspicion. The section 324-offence is committed where the defendant knew or had reason to suspect the criminal origin of the property. If stolen goods are planted in a man’s house unknown to him he cannot be convicted of receiving. But suppose that a man receives property with full knowledge of its criminal origin but with a view at once to hand it over to the police or the owner. In such a case he is not guilty of an offence under s. 324 because the receipt is innocent and further because the general criminal intent (as distinct from the specific mental requirement of knowledge or suspicion of the criminal origin of the property) to hold or to dispose of the property is lacking. The law is obviously otherwise if after innocently receiving with a view to handing the stolen property to the police or its owner, the defendant later changed his mind and concealed or disposed of the property.

It is a requirement of the section that it must be shown that the defendant at the time of receiving the property either knew or had reason to suspect its criminal origin, i.e. the property was procured by means of an act constituting a felony or a misdemeanour. The prosecution must therefore prove this ‘guilty knowledge’ on the part of the defendant. This may be proved either directly by the testimony of the thief himself, the confession of the defendant, or it may be inferred from facts such as lies told by the defendant, and any suspicious circumstances surrounding the transaction, e.g. that the goods were sold secretly at night, by a person who usually would not be in a position to sell

⁷⁵⁶ ‘Placer’ in plain English means a deposit of sand, gravel, etc., in the bed of a stream etc. containing valuable minerals in particles. By analogy, the receiver of stolen property is a depositary of valuable goods.

⁷⁵⁷ The term ‘accessory after the fact’ is used in s. 100 signify two things: having custody of or disposal of anything taken or misappropriated or otherwise obtained by means of an offence; sheltering an offender or his accessories from arrest or investigation.

such goods; that the goods were sold at a very low price; that the label on the goods had been removed; that the goods were not delivered in their original cases or containers; that there had been previous dealings of the same nature between the thief and the defendant, etc.

Doctrine of recent possession. The burden on the prosecution to prove guilty knowledge on the part of the defendant is made lighter by the doctrine of recent possession⁷⁵⁸ embodied in sections 46 and 148(a) of the Evidence Ordinance. Under section 46, whenever any person is being proceeded against for receiving any stolen property, knowing it to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge there *may* be given in evidence at any stage of the proceedings: (a) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession; (b) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty.⁷⁵⁹

Section 148 (a) lays down the presumption that a man in possession of stolen goods soon after the theft has received them knowing them to be stolen unless he can account for their possession. On proof that the defendant was in possession of goods recently stolen the court may, not must, infer that he received them knowing them to have been stolen. It is submitted that if the court may infer from proof of recent possession that the defendant received the goods *knowing* them to have been stolen, then, *a fortiori*, the court may also infer from proof of recent possession that the defendant received the goods having reason to *suspect* their criminal origin. *Qui peut le plus, peut le moins*. If **A** is found attempting to sell shoes stolen some months previously the inference may rightly be drawn that he received the shoes knowing them to have been stolen or having reason to suspect their criminal origin. It would however not be the proper inference for the court to draw that the defendant himself was the thief, given the nature of the property and the time interval between the theft of the property and the attempt to sell it. But if **A** is found in a street near the scene of a house broken into having in his possession property taken from that house a few hours previously, the inference may properly be drawn that **A** is himself the thief.

If the defendant offers any explanation, which might reasonably be true, of how he came by the goods and thus raises some doubt, he is entitled to be

⁷⁵⁸ C Anyangwe, 'Prima Facie Presumption of Guilt in the Cameroonian Criminal Process,' 1 *Proceed. Afric.* (1989), p. 132

⁷⁵⁹ In order to prove this last-mentioned fact two conditions must be satisfied: seven days' notice in writing must have been given to the offender that proof of such previous conviction is intended to be given; and there must have been given evidence at the trial that the property in respect of which the offender is being tried was found or had been in his possession.

acquitted because the prosecution would then have failed to prove beyond reasonable doubt that the defendant had guilty knowledge. Supposing that recently stolen goods are found in A's shop and he satisfactorily accounts for his possession of the goods (e.g. that the goods were part of a normal consignment of goods usually delivered to him by his regular supplier and he had no reason to suspect the criminal origin of the specific goods in question), the presumption of guilty knowledge cannot be properly made. For the general rule is that the court may infer guilty knowledge where the defendant gives no explanation as to how he comes in possession of the goods recently stolen or if the court is satisfied that the explanation he has given is untrue.

Punishment. A person guilty of an offence under s. 324 incurs a penalty of from 5 to 10 years' imprisonment, if the thing disposed of or handled was procured by means of the commission of a misdemeanour; and a penalty of from 10 to 20 years' imprisonment if the thing disposed of or handled was procured by means of the commission of a felony.⁷⁶⁰ Upon a finding of mitigating circumstances, these penalties may not be reduced to less than two and four years respectively, nor may suspension of sentence be granted.⁷⁶¹ Thus, in some ways receiving is punishable more severely than simple theft. The reason appears to be that notorious 'fences' are the centre of a great web of crime and that without the activities of professional 'fences' who dismantle ('break') stolen cars in order to sell the parts or who give stolen cars a 'face lift' and re-sell them as genuine pre-used (pre-owned) cars, far fewer cars would be stolen.

But in reality a conviction of receiving is generally regarded as a lesser conviction than one of theft, and attracts a lighter sentence. The receiver is normally perceived as not being such a bad guy as the thief is and his offence is consequently viewed indulgently. The general public attitude appears to be that the receiver is less blameworthy than the thief. It is not he who steals, and without a thief there would be no receiver. It is thought that more often than not the receiver is simply a man of easy morals who merely succumbs to the temptation of making a 'quick buck'.

§2. Misappropriation: stealing by embezzlement or fraudulent conversion

The law of theft (theft, in the narrow sense) punishes one who causes loss to another by removing his property. By contrast, the law of misappropriation (known in some jurisdictions as embezzlement) punishes one who causes loss to another by destruction, waste or conversion of another's property entrusted to him for a specific purpose. Here the property came into the hands of the embezzler lawfully and for a particular purpose, but he then caused loss to the owner of the said property by dealing with the property in a manner

⁷⁶⁰ Section 324(1)(2).

⁷⁶¹ Section 324(3).

inconsistent with the rights of the owner. The offence punishes what might loosely be termed breach of trust or betrayal of confidence. The classes of people whose defalcations constitute misappropriation are typically agents, fiduciaries, attorneys/advocates, bailees, public officials (a separate crime) and the like.

Examples are: where an attorney/advocate in the course of his professional duties receives funds from his clients and he puts the money in his personal account (this is ethical misconduct that could lead to disbarment of the attorney/advocate after due disciplinary procedures); where an employee who has custody of his employer's property appropriates it to his own use; where an investment broker mingles with his own money the funds given to him to invest in the stock market; and where a bank teller uses a customer's deposit for his own needs.

The case of the bank teller calls for a little more explanation. It is the usual banking practice to entrust the teller with money to pay out to customers various sums legitimately requested by them. When money is thus entrusted to the teller he has mere custody of it and not possession. The bank retains constructive possession of the money. If then the teller helps himself to the money he can properly be convicted of misappropriation. Where, however, a customer of the bank deposits money with the teller possession of the money and not just mere custody of it passes to the teller. The bank cannot be said to retain constructive possession because it never had possession of that money. The situation is different where the teller puts the deposit made by the customer in a till, drawer or safe designed for that purpose by the bank. When that happens, constructive possession of the money becomes vested in the bank. If the teller then helps himself to any money in that place he would have committed the offence of misappropriation.

The Code deals with three types of misappropriation, namely, simple misappropriation, special misappropriation, and aggravated misappropriation, based on the nature of the thing misappropriated or the professional calling of the person accused of misappropriation.

It is a good partial defence to a charge under s. 319 that the section does not apply to acts done between spouses or between relatives, as stated in s. 323.

2.1. Simple misappropriation

The offence of misappropriation under section 318(1)(b) is committed where a person is entrusted by another with movable property for the purpose of custody, return, accounting or any particular manner of dealing and he causes loss to that person by destruction, waste or conversion of the said property. The prescribed penalty is the same as that for simple theft. A bailee who causes loss to the bailor by destruction, waste or conversion of the property entrusted to him would have committed the offence of misappropriation. The

element of entrustment must be proved, otherwise the charge will fail. In *Kometa John Fonta v The People & Anor* (2006)⁷⁶², one Sule Nambobi, a local businessman, was contracted to build the administrative block of the Government Secondary School Ndop. The appellant, Kometa John Fonta, was his secretary and supervised all his business projects. Sule Nambodi had the site of the proposed building prepared. He had stones and sand deposited on it. He engaged the workers of one Sule Yissi to carry out the construction work under the supervision of the appellant. Work was still in progress when Sule Nambodi died on 1 July 1986. His successor, Wudulyi Nambobi Ignatius, gave appellant 600 000 francs, being money requested by appellant to complete the project. Wudulyi Nambobi later asked appellant for a copy of the contract award decision and for the payment in respect of the building project. The appellant ignored both requests. Following a complaint lodged against him, appellant was charged with retaining the contract award decision and with conversion of 400 bags of cement, property of Sule Nambobi. The charge was theft by misappropriation under section 318(1)(b). He was convicted by the Ndop Magistrate's Court and sentenced to 2 years' imprisonment. On appeal, held, Njumbe J delivering the judgment of the Court (*coram*: Tume, Ambe, Njumbe, JJA, Vice Presidents), that the judgment of the trial court must be set aside as the charge of theft by misappropriation was not made out, there being no evidence that the 400 bags of cement were ever entrusted to the appellant.

Where there is a serious doubt in the prosecution's case created by a material contradiction on the record as to the actual amount alleged to have been misappropriated, the doubt must be resolved in favour of the accused. It was so decided in *Ndumbi Stephen v The People* (2006)⁷⁶³. The facts on which the appellant was tried and convicted were as follows. A, desirous of running a taxi business hired a driver, B, to drive his vehicle for that purpose. The appellant was appointed caretaker. B was required to hand over to appellant on a daily basis all daily intakes from the taxi business. The amount handed over was to be entered in a record book to be kept for that purpose and to be signed by both B and the appellant. Out of the monies handed to him, appellant was required to pay monthly A's utility bills (water and electricity) to B, give a stated amount of allowance to A's child, and hand the rest of the money to A. Appellant was also required to repair the taxi whenever it broke down, using some of the monies collected and handed to him. The case against the appellant was that he did not account for 150 000 francs remitted to him by B. He was convicted of theft by misappropriation (section 318(1)(b)) and sentenced to three years' imprisonment. On appeal to the Bamenda Court of Appeal (*coram*: Tume, Njumbe, Angyiembe, JJA, Vice Presidents) it was held that the prosecution had failed to prove misappropriation as required by law in

⁷⁶² Appeal No BCA/MS/13c/2004, unreported.

⁷⁶³ Appeal No. BCA/MS/9c/2005, unreported.

that there was a material contradiction on the record as to the actual amount alleged to have been misappropriated, that this material discrepancy created a serious doubt in the prosecution's case, which doubt must be resolved in favour of the appellant.

However, the proviso to s. 318(1)(b) exempts from the law of misappropriation a loan of money and a loan of goods for consumption. These are in substance cases of breach of contract, and it does not seem right that the law of misappropriation should be prayed in aid to protect the lender. The law of contract provides adequate protection and redress.

A trustee can be convicted under this section for misappropriation of trust property. The trustee is of course the legal owner of the trust property, but he is not the beneficial owner (i.e., the owner in equity). If he defeats the equitable interest of the beneficiary or *cestui que trust* (i.e. he causes loss to the beneficiary by destruction, waste or conversion of the trust property) he will be guilty of misappropriation. In the case of a charitable trust there is no owner in equity (beneficial owner). But there is no reason why any person having a right to enforce the trust (such as the Chief Law Officer, for example) may not be regarded as the person to whom loss is caused where the charitable trust property is destroyed, wasted or converted. It follows that if trust property is misappropriated the indictment should state the loss as having been caused to the beneficial owner (in the case of an ordinary trust) or to the person having the right to enforce the trust, such as the Chief Law Officer (in the case of a charitable trust).

A person who in law is a mere debtor may in equity be a constructive trustee of money. So, if **D** is a constructive trustee of a fund for **V**, then if **D** misappropriates the fund a prosecution under section 318(1)(b) could lie.

There are a few procedural and evidential matters regarding a charge of misappropriation by a trustee which should not escape notice. Where a person alleged to have offended against section 318(1)(b) is a trustee he cannot be arrested without a warrant⁷⁶⁴. And if civil proceedings have been taken against a trustee in respect of any act done by him which is an offence under section 318(1)(b), he cannot afterwards be prosecuted for the same cause without the sanction of the court or judge before whom the civil proceedings were or had or are pending⁷⁶⁵. 'Trustee' for the purpose of these procedural matters includes only the following persons and no others: trustees upon express trust created by a deed, will or instrument in writing, whether for a public or private or charitable trust; trustees appointed by or under the authority of the law for such purpose; persons upon whom the duties of any such trust devolve; and executors and administrators.⁷⁶⁶

⁷⁶⁴ Schedule III (B), section 43.

⁷⁶⁵ Schedule III (B), section 48.

⁷⁶⁶ *Ibid.*

It is a credible defence for a trustee charged with misappropriation under s. 318(1)(b) to prove that before being charged with the offence he had in consequence of the compulsory process of a court in an action or proceeding instituted in good faith by a party aggrieved, or in a compulsory examination or deposition before a court, disclosed on oath the act alleged to constitute the offence.⁷⁶⁷

A trustee of property is not entitled to refuse to answer any question or interrogatory in any civil proceeding in any court on the ground that his doing so might tend to show that he had committed an offence against section 318(1)(b).⁷⁶⁸

2.2. Special misappropriation

Section 319(4) punishes as ‘special misappropriation’ the misappropriation by a debtor of his own property charged with the debt. A debtor, who destroys, wastes or converts his own property charged with the debt, commits an offence against section 319(4).

An offence is also committed by the debtor who salts his property away by transferring it to a third party (e.g., his spouse, child, relative, trusted friend or employee); or the debtor who, upon being sued, conceals or removes his property, with intent to defraud his creditors. Salting away or concealing one’s own property charged with debt is tantamount to conversion and results in causing loss to the creditor.

The penalty for this offence is the same as that provided under section 318, which is imprisonment for from three months to five years and/or a fine.

2.3. Aggravated misappropriation

By section 321, misappropriation is aggravated where it is committed by any of the following persons in their capacity as such: counsel, notary, public auctioneer, bailiff, process server, business agent, an employee or employer against his employer or employee, and the person who advertises publicly for the subscription of money. The offence is punishable by a maximum term of imprisonment of 20 years and a fine.

In *The People v. Asah Jefferson* (1986)⁷⁶⁹, the defendant, an employee, caused loss to his employer by misappropriating the sum of 50 000 francs. The money had been entrusted to him by his employer for the purpose of payment into a specific account with the Bamenda Credit Union. He was convicted of aggravated misappropriation and sentenced to 12 years’ imprisonment.

The accused in the case of *The People v. Ngenfonjob Napoleon* (1987)⁷⁷⁰, an

⁷⁶⁷ Schedule III (B), section 49.

⁷⁶⁸ Schedule III (B), section 50.

⁷⁶⁹ Suit No. HCB/76.c/86, unreported.

⁷⁷⁰ Suit No. HCB/17.c/87, unreported.

employee in charge of a store, got ten years for aggravated misappropriation. He caused loss to his employer by misappropriating the impressive amount of 18 661 190 francs. An accountant brought in by the employer to take the stock of the store found that amount missing and the accused could not account for the loss.

The aggravation in these cases relates to the fact that the embezzlers are persons in a position of trust, and are expected to avoid misconduct such as fraud, deceit or dishonesty. The aggravation of responsibility in respect of persons who advertise publicly for the subscription of money is designed to protect the general public from frauds. The legal effect of aggravation is that the penalty for ordinary misappropriation is doubled.

On a charge of aggravated misappropriation under section 321 it must be proved that the accused is a person within the class of persons listed in the section. If this fact is not proved, an indictment under the section will fail. If the accused is, for example, prosecuted as an employee who allegedly committed the offence and a legal analysis of the relationship between the accused and his supposed employer shows that the accused is in fact not an employee, the indictment would fail.

In *People v. Daniel Ako Agbor* (1973)⁷⁷¹ the accused was appointed by the Presbyterian Bookshop (Presbook) as a shopkeeper in their book depot at Buea. Upon so being appointed he paid a security deposit to Presbook. The shop was stocked with books, stationery, wristwatches, etc. It was the duty of the accused while acting in his capacity of shopkeeper to sell the articles in the shop for cash or on credit and undertake repair jobs to wristwatches. The accused was debited with all the articles supplied to his shop while Presbook was credited with the said costs. The accused was under instructions to make payments to the bank whenever his intake of money amounted to 50,000 francs or over. All retail shops of Presbook were allowed to keep outstanding Debtors'Accounts and the accused was allowed to give credits to other persons and bodies as approved by the Head Office. All the retail shops also had the permission of Presbook to give out goods to Government Departments on credit upon production of Local Purchase Orders (LPO), letters or Orders signed by the appropriate Head of Department.

Following a stock taking of the shop accused was found short of 2 841 058 francs and he readily accepted liability for the said shortage, but then failed to make good the said amount. The accused was also alleged to have fraudulently falsified the account of customers in order to make detection of the shortage difficult, if not impossible. The shop was immediately closed and the matter reported to the Police. The accused was arrested and arraigned in the Buea High Court for aggravated misappropriation contrary to section 321(1)(b) of the Penal Code. At the trial the accused admitted almost every detail of the

⁷⁷¹ (1971-73) UYLR 140.

case except for certain details. He said he accepted liability for the shortage in the hope that he would be allowed to keep his job and thereby enabled to repay the said amount. He denied falsification of the accounts of customers and knowledge of the invoices tendered in court and admitted as exhibits. He said he was not always present in person in the shop, which used to be left in charge of other shop workers and that no records were kept of day-to-day sales and other transactions. In the end he denied ever stealing or misappropriating any money belonging to Presbook or anybody.

After considering the evidence, Mr. Justice Nigier-Thomas concluded as follows: that the nature of the relationship that existed between the accused and Presbook was not an ordinary employee-employer relationship but a contractual relationship that was mercantile in detail, being in the nature of agency or factor, governed by the English Factors Act 1889; that by that relationship the accused became autonomous and a debtor to Presbook for all the goods debited to his account and credited to Presbook; that therefore by this act of debit/credit both possession and ownership of the said goods were transferred to the accused and hence lawfully acquired by him; that the question of misappropriation did not arise; and that Presbook's remedy was to seek relief in the civil courts. The accused was accordingly acquitted.

§3. False pretences: stealing by tricks or cheating

Historical. The offence of false pretence was anciently known in some jurisdictions as cheating. 'Cheats' was a term used to refer to those merchants who used false weights and measures in their trade, thereby indiscriminately cheating the public. A cheat was thought to be very different from the person who simply made a fool of another in a one-to-one transaction. Even today people tend to regard theft by false pretences as less serious than ordinary theft.⁷⁷²

Definition. 'False pretence' is defined in s.318 (1)(c) as "influencing a person deceitfully by tricks or by representation or concealment of any matter of fact." The law of false pretences directs attention to what exactly the offender did in order to deceive: he deceived by tricks; he deceived by representation; he deceived by concealment of a matter of fact.⁷⁷³ It is thus possible under the law of false pretences to convict a person for causing loss to another by false pretences where, for example, goods or services are obtained from a coin-operated vending machine through deceit by inserting a metal disc into the machine. If a machine is so programmed as to confer a thing or a benefit on presentation of a coin or a note or a token the use of a false coin, note or

⁷⁷² A.H. Loewy, *Criminal Law in a Nutshell*, West Publishing, St. Paul, 1975, pp. 93-94.

⁷⁷³ Deception on the other hand focuses attention on the effect that the offender deliberately produced on the mind of the person deceived.

token would be a criminal deception upon the programmer. Accordingly, the fraudulent manipulation of machines which enable a person to obtain by payment a service or facility may be prosecuted under s.318 (1)(c).

3.1. Simple false pretences

Section 318(1)(c) makes it an offence for anyone to cause loss to another by false pretences. In general, this offence in which the commonest form of loss involved is that of property is similar to theft in respect of the property that is the object of the false pretences. 'Property' bears the same meaning in this offence as in theft. Accordingly, one can cause loss by deception from a possessor, just as one can steal from a possessor.

The notion of false pretences in s. 318 (1)(c) is wider than the ordinary meaning of false pretence. It is closer to the concept of deceit in tort law, fraud in contract law, and deception in the criminal law of some jurisdictions. The false pretender must have intended to influence his victim deceitfully. In the case of deceit by representation, which is the commonest form of false pretence, the deceiver should have known that his representation was untrue, or he must have recklessly made a deceitful representation of a matter of fact that is intended to and does cause loss to the victim. The false pretence may range from clear misrepresentation or fraud to simply writing a bad cheque.⁷⁷⁴

Statement of fact and of opinion. The false pretence must relate to a matter of fact, whether past or present, not of opinion. The trader in foodstuff who sells to a customer what he describes as 'Oshie yams' or 'Banso beans' when in fact those commodities are not, is guilty of causing loss to the customer (i.e. taking his money) by a false pretence relating to a present matter of fact. A false pretence which envisages a representation of a past or present fact which is proved to be false would sustain a charge under the section even if it involves of necessity an element of futurity, as for example, a representation by the accused that he had a job which he was in a position to offer. Literally then, a false pretence could also cover a future fact. Because there is something incongruous in the notion of a deception as to the future, a charge worded in terms of a false pretence as to the future would usually be understood as relating to the defendant's state of mind or to mean that the existing facts are such that the future facts will occur.

False pretence as to opinion is another matter. Suppose that the trader in foodstuffs says to a customer, "I believe these are excellent Oshie yams". That statement is merely one of opinion, and the trader has committed no offence.

⁷⁷⁴ A person has a right to freedom from being improperly induced or persuaded to do something, or not to do something, by someone's trickery. Misrepresentation (fraud, deceit) is thus a tort, the essence of which is that the defendant consciously tricked the plaintiff and that if the defendant had given him the correct information he would not have acted as he did.

If a herbalist sells a herbal cocktail to a patient saying to him, “This is great medicine from Oku. It will cure your illness in no time,” no offence is committed. If a man from Kembong says, “This is the revered Obasinjom from Kembong. It will exorcise the witchcraft from your community,” no offence is committed as well. Statements such as these are mere ‘puffery’ or ‘puffing’ (i.e. nebulous commendation or reasonable exaggeration) which any salesman or public relations officer can be expected to indulge in to build up his product or to exaggerate its qualities, and which the buyer should learn to guard against.

False opinion of value usually does not qualify for false pretence, especially where the opinion is given in vague terms such as, for example, ‘a wonderful machine’, ‘a fantastic product’, ‘the best product on the market’, ‘excellent value for your money’. A statement of this nature is merely ‘poetic’ language as it is too frothy or too obviously fanciful to be nailed down as a false pretence. However, a false statement of value could qualify for false pretence if given in such a way as to appear to be a statement of fact rather than opinion, as where a person says, “I can assure you that this is an original painting of great value.”

It is still unclear whether a misstatement of law could amount to a false pretence. On the one hand, it may be argued that since everyone is presumed to know the law a deceitful representation in regard thereto cannot be regarded as false pretence. On the other hand, a counter argument could be made that the maxim ‘ignorance of the law is no excuse’ was never coined to shield reprehensible tricksters.

Influenced deceitfully. The law of false pretence requires that it be shown that the victim of the false pretence was influenced deceitfully by either tricks, or representation, or concealment of a matter of fact. A number of situations may be considered. Supposing that a landlord is dunning his tenant for rent, and the tenant in order to buy peace and improve the atmosphere for a few days, gives the landlord a cheque, which is later dishonoured. Supposing again that a debtor tells his creditor a false ‘hard luck’ story and the creditor does not promise to hold his hand, but in fact forebears for a time to press for payment. Supposing yet again that a debtor writes out a cheque for the amount owed to his creditor and gives it to him, but which is dishonoured. In all these cases the creditor has been influenced deceitfully but he has suffered no loss. At worst the debt owed has merely been temporarily evaded. The obligation to pay the debt subsists, the deceit notwithstanding; and the debt remains recoverable by the creditor in any way open to him. The deceiver is therefore not guilty of an offence under s. 318 (1)(c), nor under any other section of the Code. He has committed no offence.

But suppose that Pig has been importuning Tortoise for payment of his debt. Tortoise is unable to pay and contrives to completely get out of fulfilling

his obligation to pay the debt. One day Tortoise spies Pig approaching his house. He knows he is coming to pester him again for the debt. Tortoise asks his wife to turn him over on his back and to pretend that his flat belly is a grinding stone. Pig finds Mrs. Tortoise busy grinding some condiments on the 'grinding stone' and says he wants to see her husband in connection with the money he owes him. Mrs. Tortoise replies that her husband has been away for several days and that she does not know his whereabouts. She then ignores Pig's presence and occupies herself with her grinding. After a while an angry Mr. Pig grabs the 'grinding stone' and throws it outside. This action sends Mrs. Tortoise wailing uncontrollably. Shortly afterwards Tortoise comes in and on being told what happened feigns anger and declares his readiness to honour his debt provided Pig returned his wife's grinding stone. Pig has since been digging around with its snout in fruitless search for that stone.

Clearly, Tortoise has by false pretences caused loss to Pig. He is guilty as principal offender and his wife as accomplice. But merely dodging one's creditor by using a trick, as where a debtor gets his wife to tell his creditor he is not at home, is not an offence.

Using a false name or title, for example, is probably a petty humbug. But if a man, in order to cause loss to another, deceives him by tricks such as impersonation or using an assumed title, he can be convicted of causing loss by false pretence.

Is the so-called '419' phenomenon (the 'smooth-tongued trickster', the 'briefcase business fraud', the 'long firm fraud', 'the 'flight by night firm') caught within the terms of section 318 (1)(c)? Suppose that some villains claim to have set up a Foundation that awards study bursaries to meritorious applicants. They invite applicants from the general public, each application to be accompanied with a US 50 dollar fee 'to cover administrative costs in processing the applications'. They collect money from a large number of applicants and then vanish into thin air. Supposing again that some racketeers set up in business and at first pay the bills they incur to wholesalers. They then run up a lot of large bills all at once, auction their stock and fade away. In both these cases loss has been caused to the victims by deceitful representation as to a matter of fact. There is therefore no reason why section 318(1)(c) should not bite.

False pretence by conduct. A deceitful representation need not only be by words. It may also be by conduct as can be seen from many tort and contract cases. When a person dons a uniform he impliedly represents that he belongs to the organization that gives him the social right to wear it. So if he causes loss to another by the implied representation made by the fact of wearing the uniform he can be convicted of an offence under section 318(1)(c). A seller of goods or property impliedly represents that he is able to pass the title that he

purports to pass. So if he causes a loss to a buyer by passing a mere bogus title he can be convicted of false pretence.

Closely connected to the question of false pretence by conduct is the further question whether silence can amount to deception. Where there is no active deceit and where no representation can be implied, the general rule appears to be that mere silence cannot amount to false pretence. However, a false pretence may be committed by 'industrious concealment' of a matter of fact, as where active steps are taken to hide a defect in an article the defendant is selling. Similarly, if a car dealer fiddles with the mileometer of a car and thereby sheds part of the mileage of the car before re-selling it, he can be convicted under section 318(1)(c). The same provision will bite where a cardsharp keeps an ace up his sleeves and thereby gets his winnings, for a player at cards must be taken to impliedly represent that he does not keep aces up his sleeves and win through dishonesty. Again the section would bite where a shady trader sells a 'white sepulchre' (such as a corroded car that had been given a shining coat of paint) as a car in good condition.

False pretence as to intention. Section 318(1)(c) is wide enough to cover false pretences as to a person's intention, or other state of mind. If a jobbing gardener says he wants to mow my lawn and requests and gets from me money to buy an important spare part for the mower so as to be able to do the job but in fact never intending to do so, he has influenced me deceitfully by falsely representing his state of mind. There is no reason why he should not be guilty of an offence under section 318(1)(c). The law is the same where a carpenter gets money from me to make a stool and deliver it to me but in fact all along never intending to keep his promise. The promise to me was an implied representation that he intended to keep his word. The non-fulfillment of his promise amounts to deceit by implied representation. The criminal law should not, on traditional principles, be used to enforce contracts. Here, however, the situation contemplated differs from a contractual relationship in the sense that the defendant at the time of obtaining the money never intended to keep his promise. In a contractual relationship parties undertake, at least from the outset, to keep their promise.

Making of the false pretence. False pretence may be made by words, in writing or by conduct. False pretences by worthless cheques are covered by section 253, which creates and punishes a number of cheque-related offences under the general rubric of 'cheque without cover'. Since there must be some active pretence for the crime under section 318(1)(c) to be consummated, a person who merely orders and eats a meal in a restaurant does not automatically make any representation as to his ability to pay. Conduct of that nature is prosecuted as 'credit by fraud' under section 322. But where a person

wears some distinctive form of dress to which he is not entitled, that might be sufficient pretence.

Illegality of the object of the pretence. The illegality of the object of the false pretence is no defence to a charge under the section. Consider the following cases. A fraudster relieves people of their money by offering them a get-rich-quickly scheme involving illegality, when in fact he has no intention of operating the scheme. A woman obtains advanced payment for promised prostitution, having no intention of being bedded. A man obtains advanced payment for promised property to be stolen from his employer, having no intention to commit the theft. A man defrauds another by false pretences as to his capacity to assist him in the commission of an offence. The victim of a false pretence parted with his property in order that it might be put to an unlawful use. In all these cases the defendant can properly be convicted of an offence under section 318(1)(c). He cannot be heard to plead in defence the unlawfulness of the object of the false pretence.

Falsity of the pretence. For the offence under section 318(1)(c) to be committed the pretence must be false, i.e. the prosecution must prove that the victim was influenced deceitfully either by tricks, or by representation, or by concealment of a matter of fact. If there was no trick, or if the representation happened to be true, or if there was no concealment of a matter of fact, the cheat is not guilty of an offence under the provision. But if the pretence was in substance false, as where the utterer of words intended them to be understood in their untrue signification, there is a false pretence. Trivial deceits, as where a man tells a little lie are never prosecuted because the resources towards that end would rather be used prosecuting more serious offences.

Here, the word 'false' is not a *mens rea* requirement. The *mens rea* requirement for an offence under section 318(1)(c) is intention, i.e. the loss caused was intentional, and the false pretence was intentional. 'False' in this provision is an *actus reus* word, though it can be said to also carry a *mens rea* implication in the sense that the defendant must know that his pretence is false. In the prohibition of 'false pretences' the adjective 'false' expresses the fact that 'pretences' *per se* are not punishable.

Penalty. The penalty is the same as that for simple theft.

Defences. Section 323 of the Code exempts from the scope of the law of false pretences any act of false pretence by a relative against the other by which loss is caused to that relative. It is there provided that a false pretender is entitled to an absolute discharge (this result is conveyed by the words 'section 318 ... shall not be applicable to a person *guilty* of the acts therein described') if the

victim of the act of false pretence (and the loss suffered in consequence thereof) is either the false pretender's spouse, his legitimate or adopted/adoptive parents or children, or his 'natural' great grandparents or great grandchildren either living with him or after recognition by him. Also exempted from the scope of the law of false pretence is the fraudulent conduct by a surviving spouse in respect of necessities belonging to the deceased spouse.

The *mens rea* requirement that the defendant must have known his statement to be false for liability to arise lets in a defence of mistake because offences of fraud are often held to admit of a defence of mistake of law.

3.2. Aggravated false pretences

Section 321 provides for a maximum penalty of up to 20 years' imprisonment where a person guilty of a false pretence is an advocate, a notary public, a public auctioneer, a bailiff, a process-server, a business agent, or an employee or employer where the offence is committed against either person, or is an 'offender advertising or has advertised'. These categories of persons are expected, by their professional calling, to act in a way that reflects favourably on their profession, avoiding misconduct such as fraud, deceit, or dishonesty. They are required to show due diligence (i.e. to act with reasonable care) and good faith in dealing with clients. Section 321 appears designed to protect clients from sharp practices. Those enumerated in the section are professionals in who those they deal with in their professional activities place much trust. It is odd that physicians and those called to holy orders are not included on the list in the section.

3.3. Credit by fraud, and fraudulent retention

Section 322 creates and punishes three 'credit by fraud' offences and one 'fraudulent retention' offence. Any of these offences is punishable by imprisonment for from 5 days to 6 months and a small fine⁷⁷⁵.

Fraudulent retention. A person is guilty of the crime of 'fraudulent retention' within the meaning of section 322(3) if he retains without just cause anything belonging to another. To retain a thing means to continue to keep or hold or have it. The term suggests that the person retaining the chattel initially had custody or possession lawfully or in good faith and that he is keeping the chattel beyond the due date for its return or is keeping it in spite of a lawful demand to return it. The defendant will be convicted only upon proof that he retained the property in question without just cause, and that the property belongs to another.

Proof by the defendant that he had a just cause in retaining the property is

⁷⁷⁵ From 5 000 to 25 000 francs.

a good defence. Such a defence would often take the form of an honest claim of right, i.e. a showing that the defendant honestly believed he had a right to it either as owner or as a person with a better title to the property. It must be shown further that the piece of chattel belongs to another, i.e. there is another person who is entitled to the property either as owner or as someone with a better title to the property than the person retaining it. The provision requires that the retention must be fraudulent. So there is no fraudulent retention where property is retained as security for a loan.

Credit by fraud. A person is guilty of credit by fraud if he hires a taxi or occupies a room in a hotel or orders and consumes on the spot any food or drink, when he is unable to pay for them. There are thus three offences of 'credit by fraud': (i) hiring a taxi, being unable to pay for the hired taxi; (ii) occupying a room in a hotel, being unable to pay for the room occupied; and (iii) ordering and consuming on the spot any drink or food, being unable to pay for the drink or food supplied and consumed. The word 'hotel' in the section does not mean a place specifically so designated. It must be taken to bear the general meaning of any establishment providing accommodation and meals and drinks for payment, such as a hotel properly so speaking, a guest-house, a lodging-house, a motel, an inn, a bed and breakfast etc.

If the defendant, after ordering and consuming a meal, declares it a culinary disaster and refuses to pay he cannot be convicted under this section because this is a case of refusal, and not inability, to pay: he is able to pay but is not willing to do so because of the claimed poor quality of the food. But should he just quietly walk away without paying for the food or drink consumed he can be convicted of false pretences under section 318(1)(c). This is so because payment for those consumable items is expected on the spot and by entering the restaurant and ordering the meal the defendant impliedly represented that he was an honest customer whose conduct does not call for precaution, by which false pretence he caused loss to the restaurant. If he orders and takes away the food without paying for it he cannot be convicted of credit by fraud because he has not, as required by the section, consumed the food or drink *on the spot*. However, a charge under section 318(1)(c) could be laid against him. But it does not seem a conviction would lie where he orders food and drinks, which are brought and then he walks away without consuming the food or drink.

Section 322 covers cases of transactions in which immediate payment is customarily expected: ordering a meal in a restaurant or in a food court in a super market or a eating house or in a fast food facility, ordering a drink in a bar, hiring a taxi, taking a room in a hotel, buying fuel in a filling station. In these cases there is an implied representation by the customer that he can and will pay for it before he leaves. So if he is unable to pay he is guilty because he

must be taken to have been aware of his inability to pay. The case is different from that of the man who is able to pay but at the material time cannot do so, for example, because he forgot or misplaced his purse.

Any of the acts in section 322 is punishable only where the defendant was unable to pay for it. Intention not to pay is different from inability to pay. The intention not to pay would often be evidenced by immediately-following conduct (as where a diner leaves the restaurant hurriedly without paying the restaurateur, or where the hotel guest absconds without paying the hotelier, or where the bar customer leaves without settling his bill with the bartender), and this subsequent conduct is evidence of his prior dishonest intention when he entered into the transaction.

Inability to pay, by contrast, suggests lack of means, rather than unwillingness to pay, and here the court would often take into account the defendant's means of livelihood or his income in determining the issue of knowledge of inability to pay. Cases in which the defendant is able but unwilling to pay for the services, food or drinks ordered and consumed are cases of deceitful concealment of a matter of fact and for that reason the conduct stands to be prosecuted under section 318(1)(c). The defendant concealed the fact that he was not going to pay for the services provided.

Defences. A charge alleging the ordering and consumption of food or drinks on the spot, or the occupation of a room in a hotel will fail if the supply of the food or drinks, or the occupation of the room lasted for more than a week. In such a case, the transaction partakes of a 'credit facility' especially if the service provider was informed that immediate payment is not to be expected. In that case, no offence would have been committed. It is so declared in s. 322 (2). This does not mean the customer will go Scot-free. He can be sued for breach of contract. The common practice in the hospitality industry worldwide is to check-in the customer and to expect him to settle his bills (for accommodation, food, and drinks) on the checking-out day.

By section 323, credit by fraud offences or the offence of fraudulent retention "shall not be applicable to a person guilty of the acts therein described against his spouse, against his legitimate or adoptive or adopted ascendant or descendant, or against his natural ascendant or descendant up to the second degree either living with him or after recognition, or to a surviving spouse in respect of necessities belonging to the deceased spouse." The family member guilty of any of these offences would technically be convicted, but no consequence follows, a fact that is of little solace to the aggrieved family member.

Penalty. A person guilty of an offence under section 322 is liable to imprisonment for from five days to six months and a fine.

Offences against Private Property: Protection of Business and Other Property-Related Interests

The law against stealing protects particularly movable property. But apart from this there are a variety of other ways in which personal and real property in general, as well as businesses, are also given protection by the law.

§1. Protection of property against vandalism

The intentional destruction or damage of any property, real or personal, is unlawful and is punishable by imprisonment and fine, depending on the nature of the property and the extent of the damage done. The thing that is the object of protection here is damage to property *per se* and not danger to human life that the act of damaging the property could pose.

1.1 Destruction

A person is guilty of the crime of destruction under section 316(1) if he “destroys the whole or any part of any property belonging to, or charged in favour of, another”. The prosecution must prove that there was destruction and that the property destroyed belonged wholly or partly to someone else. A person cannot be prosecuted under this section for destroying property he is wholly the owner of. But if the property destroyed partly belonged to him or wholly belonged to him but was charged in favour of another, as where someone has a lien over it, a charge under the section would be proper. A charge that a tree on land belonging to X has been destroyed (by cutting it down) would however not succeed if X’s ownership of the piece of land (and therefore the tree) in question cannot be demonstrated. That was the *ratio decidendi* in *The People & Attia Daniel v. Nche Daniel* (2008)⁷⁷⁶. The respondent, Daniel Nche, stood trial in the Mankon Court of First Instance on a one count charge of destruction contrary to section 316(1). The charge recited that on or about the 17th March 2001 the respondent destroyed at Ngomgham, Mankon, a pear tree, yams, ‘colocasia’ (sic) and sweet potatoes valued at 101.390 belonging to one Daniel Attia and thereby committed an offence contrary to and punishable under section 316(1) of the Penal Code. There was a civil claim of 2 000 000 francs attached to the charge. Respondent pleaded not guilty to the charge and not liable to the civil claim. After receiving evidence from both parties the trial court concluded that both were claiming title to the same piece of land without any land certificate to substantiate their respective claim, that the underlying issue in the case was title to land and that the portion of land on

⁷⁷⁶ Appeal No. BCA/MS/8c/2006, unreported.

which the destroyed pear tree fell was neither cultivated by Daniel Attia nor by Daniel Nche. Daniel Nche was accordingly acquitted as the pear tree could not be said to belong to Daniel Attia. The State and Daniel Attia appealed to the Bamenda Court of Appeal (*coram*: Nko, Mboh, Fonjock, JJA, Vice Presidents). Held, dismissing the appeal (Nko, J delivering the decision of the Court) that the offence of destruction was not proved, the civil claim not established and that the appeal was “frivolous and a complete waste of the court’s precious time.”

Destroys. To destroy means to make useless or spoil utterly. It is immaterial how the destruction is done, whether by pulling down, breaking down, cutting down (e.g. trees), damaging, demolishing, killing (as in the case of an animal), arson, ruin, vandalism (such as throwing rocks through windows), ripping off doors, flooding a house, or whatever. It is unnecessary to show that the entire property was destroyed. A partial destruction of the property suffices to attract a prosecution under the section. Difficulties might arise in some cases in drawing the line between total and partial destruction. If the destruction is substantial, that is, it will require considerable expenditure of expenses and time to restore to its original state, the destruction could rightly be said to have been total. Mere dilapidation would not be destruction, though it remains a punishable conduct prohibited under section R. 369(7).

Any property. The kind of property destroyed is immaterial. It could be movable or immovable property: gate, lock, tree, crops, water pipe, telephone line, electricity line, coin-operated machine or other device, drainage ditch, bridge, mill, factory machinery, dam, any conveyance, any container, meter (gas, water, electricity), solar panel, Internet cable, digital television dish, television cable, the killing of any domestic animal or any animal kept in captivity. In *Nji Jato & 5 Others v. The People* (2006)⁷⁷⁷, the charge was ‘destruction’ of hundreds of eucalyptus trees. It was not clear from the case what the destruction consisted of and the appeal was decided on the defence of alibi pleaded by defendants both in the trial court and on appeal. One Ignatius Nsagha Nfor had a plantation of eucalyptus trees along the boundary between Binka and Binshua villages in Donga Mantung Division. In September 2001 there was a community clean-up campaign in Binshua in the course of which 675 eucalyptus trees at the aforementioned plantation were destroyed. The appellants were arrested and charged under section 316 (1) with destruction of property. They set up the defence of alibi. The trial court rejected it and convicted them. On appeal, however, the defence succeeded. In the considered opinion of the Bamenda Court of Appeal (*coram*: Tume, Angyiembe, Ambe, JJA, Vice Presidents), “the prosecution had to succeed on

⁷⁷⁷ Appeal No BCA/MS/5c/2005, unreported.

the strength of its case and not on the weakness of the defence case.” The Court reasoned that since “the appellants’ defence of alibi was never investigated and was never disproved the guilt of the appellants was uncalled for” and that moreover, “it is trite law that what is not challenged is deemed admitted in a trial.”

Penalty. The ordinary penalty for property destruction is imprisonment for from 15 days to three years and/or fine⁷⁷⁸. But this penalty is considerably enhanced where the nature of the property damaged is of a particular type (in terms of its structure and value), that is to say, a building, any construction (such as a bridge or high way), a ship (such as a sea vessel), plant or installation (e.g. electricity plant, telephone installation, military installation). In such a case the penalty is imprisonment for from 2 to 10 years and/or fine⁷⁷⁹.

1.2 Boundary marks and fences

Section 317 gives protection to real property by punishing any unauthorized alteration of any line demarcating properties. Under the section it is an offence to (i) destroy a boundary (whether marked by stone, pillar, fence, wood, wall, razor wire, tree, shrub, flower, or whatever) between properties⁷⁸⁰; (ii) remove a boundary mark between properties⁷⁸¹; (iii) displace a boundary mark between properties⁷⁸²; or (iv) destroy any fence of whatever nature⁷⁸³. Each of these offences is punishable by imprisonment for from 15 days to 1 year and by fine⁷⁸⁴.

The section punishes the boundary-mover because he acts dishonestly when he destroys, removes or displaces a boundary mark. One of the counts on which the defendants/appellants were convicted in *Niba Samuel & 2 Ors v The People* (2008) was that of destruction of boundary marks. The boundary-mover would invariably be the owner or an agent of the owner, of the adjacent piece of land; and the conduct is in fact a claim to more land than the boundary-mover or his principal is lawfully entitled to. The Bible says that, “wicked people take other people’s land”⁷⁸⁵ and warns against “moving an old stone that marks a border”⁷⁸⁶, under pain of a curse on anyone who “steals a man’s land by moving the boundary mark.”⁷⁸⁷

⁷⁷⁸ Of from 5.000 to 10.000 francs.

⁷⁷⁹ Of from 10.000 to 500.000 francs. Section 316 (2).

⁷⁸⁰ Section 317(a).

⁷⁸¹ Ibid.

⁷⁸² Ibid.

⁷⁸³ Section 317(b).

⁷⁸⁴ Of from 5 000 to 50 000 francs.

⁷⁸⁵ Job 24:2.

⁷⁸⁶ Proverbs 22:28.

⁷⁸⁷ Deuteronomy 19:14.

§2. Protection of consumers against sharp business practices

2.1. Usury

Cost of borrowing money. Borrowing money is an expensive habit. There are moneylenders of all kinds: banks, finance companies, credit card companies, credit unions, thrift associations (*'njangis'*), the individual moneylender, or other persons or entities regularly in the business of lending or furnishing credit. They charge interest on the money they lend. The interest rates vary. In many cases it is not clear to the borrower what exactly his loan will cost him. Credit unions and thrift associations give loans to their members only, usually at a low interest rate but on a monthly basis. Supposing that the interest rate charged is 1½% per month. That works out at 18% per year, which is by no means a low interest rate.

Banks usually charge a higher interest rate, something like a 6% monthly or yearly interest. A borrower may not realize that a 6% monthly interest rate means a 72% interest rate per year. Worse, the lender may compound the interest rate. Worse still, many bank loans are discounted in advance. This means that the interest the borrower is required to pay is deducted in advance from the loan before the borrower gets the money. Suppose that the loan is 5 million francs to be repaid in a year and at an interest rate of 6% per month. The interest rate in twelve months is 72%; 72% of 5 million francs is 3 600 000 francs. The bank will deduct in advance 3 600 000 francs from the loan, and give the borrower a mere 1 400 000 francs, an amount considerably less than what the borrower needed. Alternatively the bank may advance the 5 million requested. From the repayments made by the borrower it first deducts the 3 600 000 interest chargeable until it has been fully paid. Only thereafter will repayment on the principal (the 5 million) become effective.

Borrowers are unhappy with this sort of situation and often turn to those who offer loans 'easily' and with 'no questions asked'. But the common trick is that these loans are generally given to persons known or suspected to be in financial difficulties. The loans are made payable in short periods of time and at interest rates that may seem justified by the ease of the loan. In reality, the borrower is dealing with a Shylock, a 'loan shark', who charges extortionate rates of interest. The Bible calls him a 'loan racketeer', an 'extortioner', and forbids the "demand of interest on loans you make ... whether it is in the form of money, food, or anything else."⁷⁸⁸ The Qur'an calls him 'ungrateful and wicked', the 'rejecter of faith', 'companion of the fire', and, in completely forbidding usury a curse is pronounced on those involved in the practice because, in the words of the Prophet Mohammed, "usury is more serious a sin

⁷⁸⁸ Deuteronomy 23: 19; Ezekiel 22: 12; and see also, Exodus 22: 25; Psalm 15: 5; Jeremiah 15: 10; and Nehemiah 5:7.

than thirty-six acts of adultery”.⁷⁸⁹

The borrower often finds he is at the mercy of moneylenders. The law tries to protect him by setting a ceiling on the interest rates that may lawfully be charged by moneylenders. When money is loaned at a greater profit, or rate of interest, than legally permissible for the kind of loan in question, the loan contract is termed a usurious contract. Usury exists, then, when there is a loan of money for which the borrower agrees to pay the principal at a rate that exceeds the legal rate of interest for the kind of loan in question. Demanding or taking an interest rate that exceeds the legal rate of interest is an offence. The purpose of the law of usury is to protect borrowers from excessive rates of interest.

By section 325(1), “any lender demanding or taking interest or any other reward higher than the rate fixed by law for loans of the kind in question shall be punished with a fine⁷⁹⁰. On subsequent conviction the fine is doubled and the offender must be sentenced to imprisonment for from 15 days to 1 year.”⁷⁹¹

Any lender. The expression ‘any lender’ is to be construed widely to include any individual or association (incorporated or unincorporated) who lends a thing (money or other chattel), whether as a business or not, on the understanding that its equivalent shall be returned, and whether upon payment of interest or not. The commonest lender is of course the moneylender, be it an entity (incorporated or unincorporated) or an individual, and whether or not in the regular business of money lending. But the section does not refer to ‘moneylender’ (which the lawmaker could have, had that been the legislative intention) but to ‘any lender’. The loan can be in the form of money (the usual case), or food, or anything else. Supposing that a pawnbroker or a friendly society or a thrift association demands A’s television set as interest for a 500 000 francs loan. Assuming the value of the TV set is 200 000 francs. That would mean a 40% interest is being demanded, and if the legal limit for the kind of loan contracted is below 40%, the lender will be caught within the terms of the section.

‘Demanding’ or ‘taking’. Demanding an interest rate higher than the legal limit is a substantive offence, not an attempt. Taking an interest rate higher than the legal limit is a separate and distinct offence. The taking constitutes an offence and it makes no difference whether or not the taking arose from a demand earlier made. If there was a demand and a taking, a two-count charge should be laid one alleging a demand and the other alleging a taking.

⁷⁸⁹ Abdur Rahman Doi, *Shari’ah: The Islamic Law*, Ta Ha Publishers, London, 1984, pp. 375-381.

⁷⁹⁰ From 5 000 to 1 million francs.

⁷⁹¹ Section 325(2).

In either case, the borrower (i.e. the person from whom the demand for the higher interest rate was made or from whom the higher interest rate was taken) cannot be treated as an accessory (section 325(4)). The reason is that the law recognizes that the borrower has little choice in the matter of borrowing and so considers him a victim rather than an offender. The law therefore does not punish the borrower who gives, whether on demand or 'voluntarily', an interest rate higher than the legal limit.

Interest rate or other reward. Banks and other financial market operators can be expected to charge the interest rates fixed by law for loans of various kinds. The interest rate charged would, as is common banking practice, be stated in the loan agreement for the kind of loan in question. Suppose that a clause in the loan contract provides that the date of payment of the loan will be advanced on the occurrence of a condition or the breach of a duty, or that the borrower is allowed to pay the debt before it is due without penalty. Would such a clause, known as 'acceleration clause' or 'pre-payment clause', be usurious? It would seem not. This is strictly not a case of loan of money. There are also cases where service fees are charged that reflect the incidental costs of making a loan. This too is not usurious because the financial charge is merely a part of an increase purchase price. Then there is also the well-known practice in thrift associations of 'selling' a lump sum of money to the highest bidding member of the group (e.g. 500 000 francs may be 'sold' for one month for the price of 50 000 francs; which is an arcane way of saying the 500 000 francs is lent at a monthly interest rate of 10%). This too may not be usurious because the 'sale of money' is reflective of the risk being taken by the group as a whole in advancing money to one of its members.

Private moneylenders often charge higher interest rates on the reasoning that their loans are made with ease (often without sufficient collateral or any collateral at all) and that they thereby incur a large risk in making the loans. The interest rates are charged on a take-it-or-leave-it basis. Since the loan is often given on the basis of trust and of familiarity with the borrower, the interest rate chargeable is hardly ever stated in writing. In many thrift associations or clubs loans are granted on the basis of membership of the association (personalized treatment) and the rate of interest chargeable is generally based on what the group as a whole has agreed on.

Whatever the case, the section 325 offence presupposes the existence of a law setting the legal rate of interest chargeable by moneylenders. In the absence of such a law section 325 has no meaning. The section talks of 'any other reward'. It is not too clear what this means. Perhaps the lawmaker has in mind a reward in kind, such as a piece of land, or a reward in the form of services, to be paid as interest on the loan (which of course has to be paid back). If this interpretation is correct then the court would have to evaluate in

monetary terms the value of the reward in kind or service, and to determine from the evaluation thus made whether what was demanded or was received corresponds to an interest rate higher than the rate fixed by law for loans of the kind in question.

2.2. Forbidden sales

There are many businesses in the commercial world trying to get or to keep ‘a foot in the door’, or just looking for a new gimmick that will give them needed competitive edge. New forms of business practices have therefore emerged, some of them unconscionable practices. Since the law does not take a hands-off attitude toward business but regulates it, section 326 deals with two types of consumer-damaging practices, namely, false, deceptive or misleading public sales-promotion campaigns, and mailing of unsolicited goods to consumers.

Section 326(a) makes it an offence for anyone to “so offer goods to the public as to engender the hope of obtaining them free or at a reduced rate in consideration of persuading others to take up coupons or to buy.” The offence is punishable by imprisonment for from 1 month to 1 year and/or a fine⁷⁹².

Offer goods to the public. Goods must have been offered to the public. The method by which the offer is made is immaterial. It may be by display in a department store or a supermarket or by advertisement over radio or TV or Internet or in a newspaper, or it may be through a catalogue distributed to consumers, or it may be through a door-to-door salesperson or over the Internet or cell phone.

Engender hope of obtaining free goods. The purpose or aim of offering the goods to the public must be to engender the hope of obtaining the goods free or at a reduced price (e.g. the buy-one-get-one-free type of offer or the price-reduced-while stock-lasts type of offer). The consideration for the free or reduced-price goods must be that others are persuaded to take up coupons for the goods or to buy the goods.

‘Bait-and-switch’ sale. The type of sale that is here criminalised is not bait marketing, which is legitimate, but ‘bait-and-switch’ marketing; what the French call *‘vente à la boule de neige’*. In this kind of sale a product is offered to the public in such a way as to raise an expectation of getting the product free or at a reduced price (the ‘bait’) in consideration for persuading others to take up coupons or to buy the product (the ‘switch’). The unsuspecting consumer in effect becomes a salesperson for the offeror. Pressed by the prospect raised in him of having a free product or one at a reduced price, he importunes others to buy the product put out. The rationale for punishing this conduct is

⁷⁹² From 200 000 to 2 million francs.

thus that it smacks of coercion and deceptive public selling.

Unsolicited goods. A person is guilty of an offence under section 326(b) if he “sends goods to an addressee who has not ordered them, giving him the choice between keeping and sending them back whether or not at his expense.” A person convicted of an offence under this provision also incurs a penalty of imprisonment of from 1 month to two years and/or a fine.

When unsolicited goods are shipped to a consumer with an option to keep or send them back to the shipper, the shipper is fully aware of the fact that the return of those goods would not be cost free but would entail expending time and money. Many a consumer is unprepared or unwilling to incur such costs, all the more so as the goods sent to him are unsolicited. And yet whenever such goods are sent the letter accompanying the goods always states that failure to return them within a specified number of days would be taken as a tacit acceptance of the goods. The consumer then becomes liable to pay for the goods (even though he never asked for them in the first place), presumably on the reasoning that the said goods have been retained for a commercially unreasonable time.

The consumer is in effect being pressurized, being harassed, into buying the unsolicited goods, or constrained into spending unbudgeted for time and money to return the goods to the shipper within the stated number of days. What the seller is really doing is speculating on the fact that the consumer might out of forgetfulness keep the goods beyond the due date for their return; in that way the seller unconscionably forces a bargain. This is an unscrupulous marketing practice that breaches the right to privacy and the right to freedom from harassment and for this reason is penalised.

Still, the practices here criminalised are quite common in business sales promotion. Consumers tend to regard them at worst as no more than a nuisance. But the rationale for the offences is that they provide a modicum of consumer protection in the absence of a consumer protection law. However, these offences would seem weak and their effectiveness open to serious doubt.

2.3. Deception of shareholders

Section 313(1) punishes with imprisonment of from 1 to 3 years and with a fine, “any director, manager or auditor of a company or partnership who with intent to mislead any partner, shareholder or creditor, makes a false declaration or submits a false account.” The provision punishes two types of conduct, viz. *the making of a false declaration*, and *the submission of a false account*.

Capacity of director or manager. The offences specifically target the director of a company or partnership, the manager of a company or partnership, and the auditor of a company or partnership. Therefore only a person in any of the

stated capacity is capable of committing the offence under the section. But it is an open question whether it is essential to prove that the accused person has been duly appointed and is properly qualified to act as a director or manager, or whether it is sufficient to show that he has been acting in that capacity. Although authority is lacking, it can be argued that the better view is that it is sufficient to prove that the accused has been acting in the capacity of director or manager.

The section is meant to punish falsification by the persons therein named. The essence of the offences under the section is the intent to mislead or deceive any partner or creditor (in the case of a partnership) or any shareholder or creditor (in the case of a company).

Making a false declaration. It must be proved that a declaration was made. An oral declaration would fall within the contemplation of the section but more often than not a written declaration would be involved. The prosecution must then go further to prove that the said declaration was actually false, and false to the knowledge of the accused. A declaration whether made orally or in writing is false if it is untrue. It may be false in a material particular although no one specific averment in it can be proved to be untrue if, taken as a whole, what it implies is false on account of what it does not state.

Submitting a false account. It must be shown that there was an account, i.e. a record or a statement of the administration of money of the partnership or company, including goods, or services received or expended, with the balance. And it must further be shown that the account was false to the knowledge of the accused, and that the said account was submitted.

‘Intent to mislead’. It is incumbent upon the prosecutor to prove that the perpetrator acted with intent to mislead any of the persons named in the section, i.e. a partner of the partnership, a creditor of the partnership, a shareholder of the company, or a creditor of the company. The intent to mislead is an oblique intent, which must be proved in addition to the general criminal intent, i.e. intentionally making a false declaration, or intentionally submitting a false account, as the case may be. ‘Intent to mislead’ is intent to deceive. It is the intent to induce a man to believe that a thing is true, which is false, and which the person practising the deceit knows or believes to be false. This means the deceiver by falsehood intended to induce a state of mind. If the accused had the intention to mislead it is no answer to a charge under the section that none of the persons named in the section was actually misled for the law does not require that any of those persons be actually misled. It is sufficient to prove that the accused intended to mislead. Furthermore, it is not necessary for the prosecution to prove an intention to defraud, i.e. by deceit to

induce a course of action; nor is it necessary to prove intent to cause pecuniary or economic loss.

Defence. It is a defence to a charge under the section to prove that the accused person, before being charged with the offence, and in consequence of the compulsory process of a court in an action or proceeding instituted in good faith by a party aggrieved, or in a compulsory examination or deposition before a court, disclosed on oath the act alleged to constitute the offence.⁷⁹³

§3. Protection of intellectual property⁷⁹⁴ against piracy

Intellectual property law is a collection of rather disparate topics, linked together by a common thread of human intellectual effort. This intellectual creativity produces a product that has enormous economic worth, albeit that it is intangible. Intellectual property is thus critical for national wealth creation and the protection of cultural identity. This branch of law describes property rights in most of the various tangible products of the human intellect. It is generally defined as rights relating to literary, artistic and scientific works; to performances of performing artists, phonograms and broadcasts; to inventions in all fields of human endeavour; to scientific discoveries; to industrial designs; to utility models, to geographical indication (i.e., name of place of origin of certain well known types or species of goods e.g. 'Banso pepper'), to trademarks, service marks and commercial names and designs; to the protection against unfair competition; and to all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. The term embraces 'copyright' and 'industrial property rights', which are rights that have a close connection with industry, viz. designs, patents and trademarks. Like shares in a company or a balance in a bank account, intellectual property is intangible property and is worth money.

The copyright of an author is not the manuscript or book, or even the words written; his intellectual property consists of certain rights in the book such as not to have it copied without his permission. An inventor's patent is not the piece of paper attesting to the registration of the patent; it is the legal rights that enable him exclusively to exploit his invention. The trademark right of a business concern is not the distinctive mark in any real sense; it is the right to take legal action against anyone else who uses it without authority.

Although it is intangible intellectual property, like other kinds of property,

⁷⁹³ Schedule III (B), s. 49.

⁷⁹⁴ See generally, P. Marett, *Intellectual Property Law*, Sweet & Maxwell, London, 1996, pp. 1-20; D.V. Davidson et al., *Business Law. Principles and Cases*, PWS-Kent Publishing Co., Boston, 1987, pp. 971-972, 978; William Cornish, *Cases and Materials on Intellectual Property*, Sweet & Maxwell, London, 2006; S. Biber-Klemm & T. Cottier (ed.), *Rights to Plant Genetic Resources and Traditional Knowledge*, CABI, Wallingford, UK, 2006; *WIPO Intellectual Property Handbook: Policy, Law and Use*, Geneva, 2004.

can be transferred temporarily or disposed of by way of gift, sale or bequest. However, a peculiarity of intellectual property rights is that they eventually lapse after a period of time limited by law. For example, in some countries, depending on the form of work involved, the duration of copyright is a 25, 50 or 70-year-period p.m.a (*post mortem auctoris* – after the death of the author). A patent is valid for 20 years from the filing date. There are different periods for other forms of intellectual property.

When the relevant duration period expires the subject matter of the rights (book, invention, distinctive mark etc.) is said to be ‘in the public domain’, meaning that the intellectual property protection over the subject matter has been lifted and that anyone may then copy or make the subject matter, or otherwise exercise the rights which formally were exclusive to the owner.

The field of intellectual property law is a wide one. The discipline includes copyright, patents, trademarks, industrial designs, confidential information or trade secrets, plant breeder’s right (horticulture too is big business!), and public lending right. But the traditional and most important forms of intellectual property are the first three, i.e. copyright, patents, and trademarks. These may briefly be considered.

Copyright is the protection given to writers, artists, and composers in respect of original expression, on tangible medium, of an idea. The right thus subsists in every form of original written work, whether recorded on paper, in a computer, or otherwise. It also subsists in artistic works, photographs, films and videos or broadcast. Copyrighted works included movies, computer software (e.g. Microsoft Windows), music, books, carpet designs, arts and crafts. Computer software (programmes and databases) is registered as a book and is thus copyrightable. In *UMG Recordings Inc. v. MP3.COM, Inc.*⁷⁹⁵, the plaintiff record companies sued the defendant for infringing copyright in the recordings on their computer magnetic discs, by loading compressed copies on to its website. The defendant disputed that it had copied the plaintiff’s works. The New York District Court found for the plaintiff and granted an injunction.

The technique used by the defendant in copy the plaintiff’s work appears in the following portion of the decision of Judge Rakoff.

“The technology known as ‘MP3’ permits rapid and efficient conversion of compact disc recordings (‘CDs’) to computer files easily accessed over the Internet. Utilizing this technology, defendant MP3.com, on or around January 12, 2000, launched its ‘My.MP3.com’ service, which it advertised as permitting subscribers to store, customize, and listen to the recordings contained on their CDs from any place where they have an Internet connection. To make good on

⁷⁹⁵ 54 U.S.P.Q. 2nd 1668 (2000).

this offer, defendants purchased tens of thousands of popular CDs in which plaintiffs held copyrights, and, without authorization, copied their recordings onto its computer servers so as to be able to replay the recordings for its subscribers. Specifically, in order to first access such recording, a subscriber to MP3.com must either prove that he already owns the CD version of the recording by inserting his copy of the commercial CD into his computer CD-Rom drive for a few seconds (the ‘Beam-it service’) or must purchase the CD from one of the defendant’s cooperating online retailers (the ‘Instant Listening Service’). Thereafter, however, the subscriber can access via the Internet from a computer anywhere in the world the copy of plaintiff’s recording made by defendant. Thus, although defendant seeks to portray its service as the ‘functional equivalent’ of storing its subscribers’ CDs, in actuality defendant is replaying for the subscribers converted versions of the recordings it copied, without authorization, from plaintiffs’ copyrighted CDs. On its face, this makes out a presumptive case of infringement under the Copyright Act of 1976. Defendant claims that its music computer files are not in fact ‘reproductions’ of plaintiffs’ copyrighted works within the meaning of the Copyright Act. Specifically, defendant claims that the simulated sounds on MP3-based music files are not physically identical to the sounds on the original CD recordings. The defendant concedes, however, that the human ear cannot detect a difference between the two. Moreover, defendant admits that a goal of its copying is to create a music file that is sonically as identical to the original CD as possible. In such circumstances, some slight, humanly undetectable difference between the original and the copy does not qualify for exclusion from the coverage of the Act.”

Copyright also subsists in musical works. Music is melody or harmony, or any combination of both. A musical work is one consisting of music, i.e. the actual composition, symphony, piobaireachd (anglicized as ‘pibroch’) or pop, exclusive of ⁷⁹⁶ any words or action (such as a ballet or opera) intended to be sung, spoken or performed with the music. For this reason, a song may have two copyrights, a separate copyright in the words of the song (this being a literary work), and a separate copyright in any recording (music) of the song. The distinction is critical because the writer of the lyrics may be different from the writer of the song. Indeed, making an arrangement of an existing piece of music may attract its own copyright in addition to and running alongside, the copyright subsisting in the recorded music and the copyright subsisting in the words of the song.

The principles lying behind copyright relating to musical works may be illustrated with a few English cases.⁷⁹⁷ In *Francis Day and Hunter Ltd v. Sydney Bron*⁷⁹⁸ the plaintiffs who were music publishers, owned, with another

⁷⁹⁶ Piobaireachd is the classical music of the Scottish Highland bagpipe, and a sophisticated musical form.

⁷⁹⁷ See, P Marett, *Intellectual Property Law*, pp. 31-32.

⁷⁹⁸ [1963] 2 All E.R. 16.

publisher, the copyright in a very popular song 'In a Little Spanish Town'. The defendants, Bron and his company, published a song called 'Why' composed by one Peter de Angelis. The plaintiffs claimed that the music of 'Why' reproduced, or was an adaptation of, a substantial part of 'In a Little Spanish Town'. The court heard recordings and voice and piano renderings. It also heard evidence from experts. After doing so it concluded that there was a definite similarity between the two pieces of music.

However, it went on to hold, based on the evidence of the composer of 'Why', that there had been no conscious copying and that there was insufficient factual evidence to prove subconscious copying from de Angelis's memory, even though he might have heard 'In a Little Spanish Town' without remembering it. The plaintiffs appealed and again lost. The Court of Appeal held that subconscious copying could be possible but that it would have to be shown that the composer was in fact familiar with the plaintiffs' work. Proof of similarity, coupled with access to the original work, raises a *prima facie* case of copying and it is then a question of fact for the court to determine in the particular case whether there is a causal connection between the two pieces.

In *Robertson v. Lewis*⁷⁹⁹, Sir Hugh Robertson a distinguished musician and conductor died in 1952, and the case was brought by the executors of his will who now held the copyright in his works. The case concerned the music (not the words) of a song 'Westering Home', which the deceased had published as an 'Old Dance Tune Arranged by' himself. The defendants had published a gramophone record of the song (with different words) sung by Vera Lynn. The plaintiffs claimed that this breached their copyright. It was held that the term 'arranged' was too vague to help the plaintiffs' attempt to show that Sir Hugh had composed at least part of the tune and that evidence adduced in court by defendants proved that the whole tune was known back in the 1930s and earlier, before the deceased had published it. The case of *Walter v. Lane*⁸⁰⁰ had laid it down that reporters who took down a politician's speeches had copyright in their written version. Plaintiffs argued that following that case the printed record itself of the 'Old Dance Tune' had copyright. But the judge decided that the facts in this case were completely different, so that argument failed.

In *Austin v. Columbia Graphophone [sic] Co. Ltd*⁸⁰¹, the plaintiff, Austin, made suitable adaptations to the tunes of John Gray's opera 'Polly' (first published in 1729). The new version of the opera had a very successful run. The defendants sent someone to the British Museum to look at the original music. He did and he produced adapted versions very close to the plaintiffs'. These were hastily published on gramophone records as selections from 'Polly'. Plaintiff sued for

⁷⁹⁹ [1976] R.P.C. 169.

⁸⁰⁰ [1900] A.C. 539.

⁸⁰¹ (1917-23) MacG. Cop. Cas. 398 (1923).

copyright infringement. The case involved two issues. Could an old tune with new adaptations be an original musical work? Could a copy, which sounded the same, although it was not a note-by-note copy, infringe copyright? The court had no difficulty in answering both questions in the affirmative.

Plans, methods, systems, or devices are not copyrightable. Copyright law traditionally protects only *expression* of ideas, not the ideas themselves. In *Designer Guild Ltd v. Russell Williams (Textiles) Ltd*⁸⁰², the plaintiff's employee created an original design for a dress fabric. The design consisted of vertical stripes, with flowers and leaves scattered between the stripes, all painted in an impressionistic style. The plaintiff successfully marketed the fabric. The defendant, having seen the plaintiff's fabric, then produced a very similar design for its fabric and claimed that it had copied merely the 'idea' of the plaintiff's design, not its 'expression'. The plaintiff successfully sued for copyright infringement. Lord Hoffman stated:

"Plainly there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work. But the distinction between ideas and expression cannot mean anything so trivial as that. On the other hand, every element in the expression on artistic work is the expression of an idea on the part of the author. It represents her choice to paint stripes rather than polka dots, flowers rather than tadpoles, use one colour and brush technique rather than another, and so on. The expressions of these ideas are protected."

Another illustration of the principle that what is copyrightable is not just ideas in themselves but the particular form in which it is conveyed is by the following three cases: *Walter, Donoghue*, and *Express Newspapers*. In *Walter v. Lane* (1900), reporters from *The Times* newspaper took down speeches delivered, apparently extempore, by a politician. These were slightly edited and published in the newspaper. The reporters were employed on terms that copyright in their work for the newspaper was held by the proprietors. Lane subsequently published a book containing these speeches, admittedly copied from *The Times*. Walters sued on behalf of the newspaper proprietors. The House of Lords ruled that the newspaper's copyright in the speeches would be upheld and that a perpetual injunction would be granted. The politician in this case made no claim to copyright and so the question whether he had was not canvassed. But it seems clear that a person who delivers a spoken work as the 'author' has copyright of the work, and the person who records it has copyright of the text as recorded by him.

In *Donoghue v. Allied Newspapers Ltd*⁸⁰³, a well-known jockey, Donoghue,

⁸⁰² [2000] 1 W.L.R. 2416.

⁸⁰³ [1938] Ch. 106.

gave exclusive interviews on his horse-racing career, to Felstead, a reporter from the *News of the World*. Draft articles from notes taken at the interview were shown to Donoghue and some of the articles were changed as a result of comments Donoghue made. The articles were duly published, partly as though they were actual dialogues between Donoghue and Felstead. Felstead later wished to republish the articles in another paper called *Guide and Ideas*. The *News of the World* consented but Donoghue objected, claiming that he was the author and copyright owner of the interviews. He sued for an injunction and damages after one of the articles was published against his wish. It was held that his action must fail.

Mr. Justice Farwell expounded the principle that copyright does not protect ideas but the expression of those ideas as follows:

“There is no copyright in an idea, or in ideas. A person may have a brilliant idea for a story, or for a picture, or for a play, and one which appears to him to be original; but if he communicates that idea to an author or an artist or a playwright, the production which is the result of communication of the idea to the author or the artist or the playwright is the copyright of the person who has clothed the idea in form, whether by means of a picture, a play, or a book, and the owner of the idea has no rights in that product. On the other hand, ... if an author employs a shorthand writer to take down a story which the author is composing, word for word, in shorthand, and the shorthand writer then transcribes it, and the author has it published, the author is the owner of the copyright and not the shorthand writer. A mere amanuensis does not, by taking down word for word the language of the author, become in any sense the owner of the copyright. That is the property of the author. The explanation of that is this, that in which copyright exists is the particular form of language by which the information which is to be conveyed is conveyed. If the idea, however original, is nothing more than an idea, and is not put into any form of words, or any form of expression such as a picture, then there is no such thing as copyright at all. It is not until it is reduced into writing or into some tangible form that there is any copyright, and copyright exists in the particular form of language by which, the information or the idea is conveyed to those who are intended to read it or to look at it. In the present case, the ideas of all these stories, apart altogether from what one might call merely the embellishments which were undoubtedly supplied wholly by Mr. Felstead – the ideas of all these stories, and in fact the stories themselves, were supplied by the plaintiff; but in my judgment, upon the evidence it is plain that the particular form of language by which those stories were conveyed was the language of Mr. Felstead and not of the plaintiff. The plaintiff was not the author, or even the joint author, of the articles in the *News of the World*. If that be so, it must necessarily follow that he cannot maintain this action.”

In *Express Newspapers v. News (UK)*⁸⁰⁴, *Today* newspaper, owned by News (UK), published the report of a lengthy interview by one of its reporters with Miss Marina Ogilvy, a member of the Royal Family. The newspaper made a major splash of the story, including many quotations from Miss Ogilvy's actual words. The next day the *Daily Star*, owned by Express Newspaper, published prominently its own account, including quotations from Miss Ogilvy, which clearly were taken from *Today's* interview. The court approached the case on the basis that *Walter v. Lane* is still good law. Held, that *Today's* report had shown sufficient skill and judgment in selecting and reporting Miss Ogilvy's words to attract copyright.

Patents law secures to the inventor the exclusive right to his invention. To be patentable the invention must be novel, involve an inventive step and be capable of industrial application. If a person invents something that is new, useful, and not obvious to a person of ordinary skill in the industry, the inventor is entitled to a patent. In exchange for making the method of production public, the patent right confers on the inventor an exclusive right to use, make, or sell the product for a certain length of time. The categories of patentable subject matters include process, machine, manufacture, composition of matter, and any new or useful improvement on these.

In many jurisdictions the court is often called upon to decide the question whether an invention falls within the scope of patentable subject matter. In *Diamond, Commissioner of Patents and Trademarks v. Chakrabarty*⁸⁰⁵, the US Supreme Court addressed the question whether an artificially created life form, in this case a new form of bacterium obtained by genetic alteration, is patentable subject matter. Chakrabarty had developed a new micro-organism, a pseudomonas bacterium, which degraded hydrocarbons, and so was potentially useful in clearing up oil spills. The US Patent Office had allowed patent claims to the method of producing the bacterium and an inoculum, but objected to a claim of "a bacterium from the genus pseudomonas, containing therein at least two stable energy-generating plasmids, each of the said plasmids proving a separate hydrocarbon degradative pathway". It rejected this claim on the basis that "as living things, microbes are not patentable subject matter." The Supreme Court overruled this decision of the Patent Office and allowed the claim by Chakrabarty.

The Court acknowledged that,

"the laws of nature, physical phenomena, and abstract ideas have been held not patentable. ... Thus, a new mineral discovered in the earth or a new plant found in the wild is not patentable matter. Likewise, Einstein could

⁸⁰⁴ [1990] 3 All E.R. 376.

⁸⁰⁵ 447 U.S. 303 (1980).

not patent his celebrated law that $E=mc^2$; nor could Newton have patented the law of gravity. Such discoveries are manifestations of nature, free to all men and reserved exclusively to none.” Nevertheless, the Court was of the view that in the instant case the microorganism “plainly qualifies as patentable subject matter. [Chakrabarty’s] claim is not a hitherto unknown natural phenomenon, but a non-naturally occurring manufacture or composition of matter – a product of human ingenuity having a distinctive name, character and use. ... [T]he patentee has produced a new bacterium with markedly different characteristics from any found in nature and having the potential for significant utility. His discovery is not nature’s handiwork, but his own; accordingly it is patentable subject matter ...”

The Court distinguished *Chakrabarty* from *Funk Brothers Seed Company v. KaloInoculant Company*⁸⁰⁶. In that case the patentee had discovered that there existed in nature certain species of root nodule bacteria, which did not exert a mutually inhibitive effect on each other. He used that discovery to produce a mixed culture capable of inoculating the seeds of leguminous plants. The Supreme Court was of the view that the patent applicant had discovered “only some of the handiwork of nature” and so held the product non-patentable. It observed:

It observed:

“Each of the species of root-nodule bacteria contained in the package infects the same group of leguminous plants which it always infected. No species acquires a different use. The combination of species produces no new bacteria, no change in the six species of bacteria, and no enlargement of the range of their utility. Each species has the same effect it always had. The bacteria perform in their natural way. Their use in combination does not improve in any way their natural functioning. They serve the ends nature originally provided and act quite independently of any effort of the patentee.”

In *Plant Genetic Systems/ Glutamine Synthetase Inhibitors*⁸⁰⁷, the invention related to the genetic engineering of plants and seeds in order to make them herbicidal resistant. The European Patents Office Technical Board of Appeal rejected an opposition against the grant of a patent in respect of the invention. The

⁸⁰⁶ 333 U.S. 127 (1948). But contrast the case of *Harvard Onco-Mouse* [1990] E.P.O.R. 525, EX.D, in which Harvard University was granted a patent for the invention of a transgenic mouse which was particularly susceptible to developing cancer and which was claimed as “a transgenic non-human mammal all of whose germ cells and somatic cells contain a recombinant activated oncogene sequence introduced into the said mammal, or an ancestor of the said mammal, at an embryonic stage.” A mouse produced in this way was described as a preferred embodiment of the invention and useful in testing potential carcinogens.

⁸⁰⁷ [1995] E.P.O.R. 357, Tech. Bd. App.

opposition was filed by the European-based environmental NGO known as Greenpeace, on the grounds of ‘ordre public’ and morality. The Board accepted in principle that the protection of the environment fell within the concept of ‘ordre public’, but observed such protection is called for only in the face of sufficient evidence that the environment would be damaged.

In the view of the Board, the suggestions by Greenpeace that crops might be transformed into weeds, that the herbicide resistant gene might be spread to other plants or that the ecosystem might be damaged, had raised only possible hazards. As to the objections on the ground of morality, the Board stated that it was necessary to show that publication or exploitation of the invention would be contrary to conventionally accepted standards of culture inherent in European society and civilization. The mere fact that genetic manipulation was used did not render an invention immoral. Traditional selective breeding also brought about genetic alteration and both must be treated as acceptable.

The same Board in the case of *Howard Florey/Relaxin*⁸⁰⁸ allowed a patent for the genetic engineering of DNA from a pregnant woman’s body so as to produce Human H-2 relaxin. This was opposed on moral grounds considered to be of sweeping generality, namely, that the procedure involved: the patenting of human life, the abuse of pregnant women, the return of slavery, the sale of women piecemeal to industry, etc. The Board held that these objections were insufficient and that DNA is not ‘life’ but a substance carrying genetic information, which can be used to produce proteins that are medically useful.

*Biogen Incorporation v. Medeva PLC*⁸⁰⁹, concerned an artificially constructed molecule of DNA carrying a genetic code which, when introduced into a suitable host cell, will cause that cell to make antigens of the virus Hepatitis B. Viral antigens are proteins on the surface of the virus or inside it. When antigens are detected, they trigger the production of antibodies, which neutralize the virus. To vaccinate a person against a disease, the isolated antigens for the disease can be artificially introduced into the system, without actually exposing the person to the virus itself, thus stimulating production of the necessary antibodies to defend against later viral attack. The technology in this patent enabled the production of antigens for Hepatitis B for use in diagnostic tests for the presence of the disease and in vaccination against the disease.

There was a strong general interest at the time of the invention (1978) in antigens. It was known at that time that Hepatitis B was produced by a particle (the ‘Dane particle’) containing a circular DNA molecule (a plasmid), which had two antigens, one at its surface and one at its core. The inventor, Professor Murray, was the first person to use recombinant DNA technology to

⁸⁰⁸ [1995] E.P.O.R. 541, Tech. Bd. App.

⁸⁰⁹ [1997] RPC 1.

produce Hepatitis B antigens. The invention was won by Biogen a company he helped found. Biogen filed a patent application that claimed essentially all recombinant DNA processes by which Murray's synthesized antigen could be produced. The House of Lords held that the claim must fail and that the patent filed for would be denied.

Per Lord Hoffman:

"It is said that what Professor Murray showed by his invention was that it could be done. HBV antigens could be produced by expressing Dane particle DNA in a host cell. Those who followed, even by different routes, could have greater confidence by reason of his success. I do not think this is enough to justify a monopoly of the whole field. I suppose it could be said that Samuel Morse had shown that electric telegraphy could be done. The Wright brothers showed heavier-than-air flying machines. It is inevitable in young science, like electricity in the earlier nineteenth century or flying at the turn of the last century or recombinant DNA technology in the 1970s, that dramatically new things will be done for the first time. But care is needed not to stifle further research and healthy competition by allowing the first person who has found a way of achieving an obvious desirable goal to monopolize every other way of doing so."

Disputes sometimes arise between employer and employee regarding an invention developed by the employee. The general rule is that the employer will own the invention only if the employee developed it in the ordinary course of the duties he was engaged to perform. Where the job description of the employee does not require him to develop an invention the claim of ownership by the employer will fail. Even where the contract of employment contains a clause stipulating that ownership of any invention by the employee would vest in the employer, the courts may be unwilling to enforce it if its terms are too wide, unreasonable and amount to a restraint of trade.

In *Spencer Industries Property Limited v. Anthony Collins*⁸¹⁰, the defendant was employed as a sales representative. He made technical improvements to a process and apparatus used for retreading tyres. His employer claimed ownership of the invention on the ground that it was made within the scope of his employment. It was held that the claim must fail because the employee's role was exclusively sales-related, did not include product invention, and was not made in the course of his paid work.

Similarly, in *Electrolux Limited v. Hudson*⁸¹¹, the defendant, a senior store man invented an adaptor for a vacuum cleaner in his spare time with the assistance of his wife. His contract of employment had a clause which

⁸¹⁰ [2003] FCA 542.

⁸¹¹ [1977] FSR 312.

stipulated that anything invented or discovered in relation to any of the plaintiff's products in the UK or elsewhere, had to be divulged to them and that ownership of any such invention or process would vest in them. The plaintiff, Electrolux, manufactured vacuum cleaners and claimed to be the owners of the adaptor invented by the defendant, for the purpose of applying for a patent. The court held that there was no implied undertaking upon the defendant to hold the invention for the plaintiff, since he was not employed to invent and had made the invention outside working hours without using his employer's materials.

Trademark is a distinctive mark or symbol that distinguishes goods and services in the course of trade. They may take the form of words (e.g. CocaCola), symbol (e.g. the MacDonald 'M'), a device or shape (such as the shape of the coca-cola bottle), packaging (such as the particular packaging of a perfume), a sound (such as the sound that comes when a Microsoft Words computer is switched on), a service mark (e.g. 'Crosland Airways', 'Pizza Hut'), certification marks (e.g. 'Woolmark'), collective marks (e.g. the symbol of a political organization). They are used to identify a particular company or product, and the origin of goods and services. Closely related to trademarks are service marks (distinctive symbols designating the services offered by a particular business or individual) and logotypes (identifying symbols). If a sign is not distinctive, it cannot function as a trademark and its registration would be refused.

In *Unilever Limited's Trademark*⁸¹², a red stripe in toothpaste was not registrable as the device was held to be too simple to be distinctive. Similarly, in *AD2000 Trademark*⁸¹³, an application to register 'AD2000' for various goods was refused on the ground that it was devoid of distinctive character. Hobbs QC stated that, "a sign possesses a distinctive character if and when it is endowed by nature and/or nurture with the capacity to communicate the fact that the goods or services with reference to which it is used recurrently are those of one and the same undertaking." Again, in *Re Hallelujah Trademark*⁸¹⁴, a registration for the word 'hallelujah' in relation to clothing was held to have religious connotations and as such was refused registration as a trademark in relation to women's clothing.

Industrial designs and patterns, if they are aesthetic and nonfunctional can be registered and acquire registered design right. But where the designs are not just aesthetic but also fulfil a function, unregistered design right gives them protection under the tort known as 'passing off'. These two kinds of design

⁸¹² [1987] RPC 13.

⁸¹³ [1997] RPC 168.

⁸¹⁴ [1976] RPC 605

protection (i.e. registered and unregistered right) have more in common with copyright than with patents, but offer reduced protection than copyright.

Trade secrets (confidential information) range from manufacturing secrets to confidential lists of customers. There are special processes, formulae, device, compilation or information and the like that are guarded and treated confidentially by the holder of the trade secret. Employees of a firm that has trade secrets may not betray their loyalty to the firm by revealing the trade secrets to others. To do so is a tort, and the employee can be held liable for any damages suffered by the employer. In addition the recipient of the information is guilty of appropriating the trade secret; and use of the secret can be stopped by injunctions. The recipient of the information will also be liable for damages suffered by the trade-secret holder.

In *Attorney-General v. Guardian Newspaper Ltd* (1988), and in *Attorney-General v. The Observer Ltd* (1989), the UK Government did not use breach of confidence action but instead sought an injunction to retrain ex-members of the security services from disclosing national secrets. This followed the publication of the book, *Spycatcher*, by a former member of MI5, the British secret intelligence agency. The book was published in the US and the defendant newspapers in both actions had published extracts from the book. The House of Lords refused the injunction sought by Government against the two newspapers on the ground that the confidential nature of the contents of the book had been destroyed by publication of the said book in the US.

In *Seager v. Copydex (No. 1)*⁸¹⁵, the plaintiff invented and patented a carpet-grip, the 'Klent', which he was seeking to exploit. He discussed with two of the defendant's managers the possibility of the defendant marketing the 'Klent'. In the course of the discussions the plaintiff revealed to them the crucial idea of another grip whose characteristics were a V-tang and a strong point. At the end of the discussions the managers stated that they were not interested in the idea. The negotiations over the 'Klent' having failed, the defendants developed their own carpet grip which turned out to embody the very ideas of the plaintiff's alternative carpet grip. It was to be called the 'Invisigrip', a name the plaintiff said he had suggested. The defendants claimed that they had not used the plaintiff's design idea in the preparation of their carpet grip. They claimed they had honestly forgotten confidential information communicated to them by the plaintiff. The Court of Appeal found in favour of the plaintiff and awarded damages. The Court reasoned that the defendants had unconsciously copied the plaintiff's design idea and used the information imparted to them during confidential negotiations.

In *Gartside v. Outram*⁸¹⁶, a firm of wool-brokers sought to prevent their

⁸¹⁵ [1967] 2 All E.R. 415.

⁸¹⁶ (1856) 26 LJ Ch 113.

former sales clerk from using customer information obtained by him during his period of employment. The ex-employee in turn alleged that the wool-brokers' business was conducted in a fraudulent manner. It was held that if proven, these allegations would destroy any obligation of confidence since there is no confidence in the disclosure of an iniquity.

In *Lion Laboratories Ltd v. Evans*⁸¹⁷, the plaintiffs were the manufacturers of the intoximeter device used by the police for measuring alcohol consumption by road users. The defendants who were former employees of the firm revealed to the press documents obtained while they were employees, which indicated that the devices were erratic and unreliable. An action against the former employees for breach of confidence failed on the grounds that faulty intoximeters represented a serious threat to the fair administration of justice and it was essential to ventilate public disquiet about the accuracy of the evidence provided by the machines.

Infringement of intellectual property right. Intellectual property protection is effected primarily in the civil rather than the criminal courts. Intellectual property lawsuits are mostly likely to concern alleged infringement. In the case of copyright this would be unauthorized total or substantial copying, distribution, or derivation. In the case of a patent, infringement would take the form of unauthorized exploitation of the patent. In the case of trademark it would be copying the trademark, or using a mark or symbol deceptively similar to that of a competitor, or passing off (palming off) when goods and services are being sold or advertised by a competitor as those of another business. Basically, the person who is passing/palming off goods is fraudulently taking advantage of the goodwill and brand loyalty of the imitated producer. It will also frequently involve patent or copyright infringements, as well as service marks, and trade names.

Civil remedies. The usual civil remedies for such infringement of intellectual property right are damages and injunction (interdict). Damages may be awarded for the loss sustained by the plaintiff. Alternatively there may be ordered an account of the ill-gotten profits of the defendant. There may also be ordered the delivery up of the offending articles which infringe the plaintiff's intellectual property right, and the court will decide whether they be destroyed or handed over to the plaintiff. The plaintiff may also seek injunctive relief. The court may grant an injunction enjoining the defendant not to continue the offending articles.

In England the Anton Piller orders⁸¹⁸ have proved a powerful weapon

⁸¹⁷ [1984] 2 All E.R. 417.

⁸¹⁸ The order takes its name from the Court of Appeal case of *Anton Piller K.G. v. Manufacturing Processes* [1976] 1 All E.R. 779

against industrial pirates. A rights owner who has strong grounds for believing that his rights are being infringed can file an *ex parte* application (i.e. without telling the other party) in court praying for an Anton Piller order. The order allows him, in the company of his solicitor, to search the other party's premises for evidence of infringement and to remove infringing articles and evidence into the custody of his solicitor.

Criminal action. Apart from a civil suit, a rights owner may resort to using the criminal law against the infringer of his intellectual property rights. Counterfeiting trademarks, commercial dealings in products which infringe copyright, forging a registered trademark or making use of a registered trademark that has been forged, making a false claim of registered design or patent rights, copyright piracy, falsifying the register of copyrights and patents, etc. are all criminal offences in many jurisdictions. Sanctions are imposed to punish for willful infringement of any intellectual property right on a commercial scale and to deter further infringement.

Punishment is usually by imprisonment or by fine or both. In addition to the custodial and pecuniary sentence, orders are invariably made to serve deterrent purposes: orders for the seizure, forfeiture and destruction of pirated works or articles as well as the material and implements used in committing the offence. The intellectual property right owner himself can apply to the customs authorities to take certain measures at the border such as to prohibit the import and export of infringing copies, to suspend the release into circulation of goods suspected to be pirated if satisfied that there is a *prima facie* case of infringement.

Limitations on IP rights (permitted acts). Intellectual property rights are usually expressed as the exclusive right to do certain things, with the corollary that the right holder can take action to stop anyone else from doing these. The rights are not always absolute. They are subject to a number of exceptions. First, *purely private* and non-commercial use of a patented invention, or use for experimental purposes only, does not infringe the patent right. Secondly, *compulsory licences* to use a patented invention or a design/pattern may be granted in certain circumstances (e.g. where the right holder is not fully exploiting the patent), as it is in the public interest that a new invention or design be fully utilized. It follows that the licence holder who utilizes the invention or design does not infringe the patent or design right.

A major limitation on intellectual property rights relates to '*fair dealing*' or 'fair use'. This applies to research and private study. There is no infringement of copyright law where the material is used for research, even if it is for commercial research. There is also no infringement of copyright law where the material is used for private study, as opposed to use for private purpose, which

would then be an infringement. In general, infringement must relate to the whole or a substantial part of a work, as the law does not concern itself with trifles (*de minimis non curat lex*).

Furthermore, the use of copyright material for *criticism*, for review or for news reporting does not amount to infringement. Nor is there infringement in the use of such material in the course of parliamentary or judicial proceedings or a commission of inquiry. Again, in certain cases it is not copyright infringement when copyrighted material is used for educational purposes or is used by libraries.

Several concessions are thus made to educational and research establishments as well as to public administration. Under the 'fair use' or 'fair dealing' doctrine therefore the teacher may use computer software for an in-class performance or display. Libraries may reproduce and distribute copyrighted works, including computer software in some circumstances.

Regarding computers specifically there is no copyright infringement if the owner of a copy of a computer programme only makes or authorizes the making of a new copy (or an adaptation) when the copy is an essential step in the utilization of the programme in conjunction with a machine, i.e. for use with owner's manual, or for making back-up copies (for archival purpose) in case the original copy is accidentally destroyed.

Furthermore, the dichotomy in copyright law between the expression of an idea (copyrightable) and the bare idea itself (not copyrightable) means that the computer programme as written is protectable on the basis that it is expression; but the unique ideas contained in the programme are not protectable. It is for this reason that the audiovisual display aspect of a video game, for example, may be copyrightable, whereas the game *per se* or the bare idea behind the game (e.g. the ever clever tortoise always outwitting the other animals; or the naughty rabbit always up to all sorts of cruel tricks) is ordinarily ineligible for copyright protection.

The copyrightability of the following products is also open to doubt: flowcharts, components of machines, and printed circuit boards that do not have computer programmes embedded in them.

After this laconic but essential presentation the offences in the Code relating to intellectual property law may now be summarily considered.

3.1. Copyright

Section 327 punishes various ways in which copyright may be infringed. The section creates seven distinct copyright infringement offences. All of the seven offences have a common element, which is that in each case the infringement must have been done in disregard of the law on copyright. Each prohibited conduct therefore presupposes the existence of a law on copyright. In the absence of such a law no offence can possibly be committed under the section.

The offences:

- It is an offence *to publish* (whether in whole or in part) any writing, musical composition, drawing, painting, or other printed or engraved matter, in disregard of the law on copyright. The material on this list must be copyrighted.
- It is an offence *to trade* in any writing, musical composition, drawing, painting, or other printed or engraved matter, in disregard of the law on copyright. Again the material must be copyrighted material. 'Trade' signifies something done repeatedly as a business.
- It is an offence *to export* any writing, musical composition, drawing, painting, or other printed or engraved matter, in disregard of the law on copyright. The material must be copyrighted material. The 'export' need not be done as a business, such as the business of exporter. A single instance of exporting suffices.
- It is an offence *to import* any writing, musical composition, drawing, painting, or other printed or engraved matter, in disregard of the law on copyright. The import need not be done as a business, such as the business of importer. A single case of importing the material suffices.
- It is an offence *to produce* by whatever means any work of the intellect, in disregard of the law on copyright. Such work of the human intellect, the production of which is prohibited, must be copyrighted work. If the work is not copyrighted or copyrightable, no offence is committed by producing it.
- It is an offence *to present* by whatever means any work of the intellect, in disregard of the law on copyright. The work in question must be copyrighted.
- It is an offence *to disseminate* by whatever means any work of the intellect, in disregard of the law on copyright. The dissemination will constitute an offence only if the work is copyrighted.

Penalty. Each of these offences is punishable by imprisonment for from 3 months to 2 years and a fine⁸¹⁹. It is mandatory for the court to order confiscation of the material used for the purpose of making infringing copies of any work in which copyright subsists (including all plates, moulds, and dies used for it). On conviction the court must also order confiscation of the proceeds of the pirated material and apply all of the said proceeds to the compensation of the injured parties. The court may, at its discretion, order publication of its judgment.

⁸¹⁹ From 20 000 to 500 000 francs.

3.2. Patents

The offences. Anyone who *infringes*⁸²⁰ a patent is guilty of an offence under s. 328 (1). A person is also guilty of an offence under the same provision if he *conceals* any counterfeit or imitation product. The same provision further makes it an offence *to sell* counterfeit or imitation product. It is worthy of note that while the selling of pirated product is an offence buying any such product is not, though on principle the buyer could be charged with aiding and abetting. Again it is an offence under the provision *to export* counterfeit or imitation product, and an offence as well *to import* such product.

These last four offences punish dealing in infringing copies of patented product. Most patent offences elsewhere, unlike those in this country, extend to unauthorized claim of patent right and unauthorized use of certain words. Thus, elsewhere, any person who falsely represents that any article sold by him is a patented article is guilty of an offence. Likewise a person who sells an article having stamped, engraved, embossed, or otherwise applied the word 'patent' or 'patented' is deemed to represent that the article is patented article and therefore guilty of an offence.

A counterfeit or imitation product is usually referred to as a pirated product. Piracy and counterfeit are a disincentive to the development and creation of intellectual property products and works. They also present a serious danger to the public especially if the counterfeit goods are foodstuffs, medicines, cosmetic products or spare parts. They prevent intellectual property owners or authorised dealers of intellectual property rights from making a living out of their work and from recouping their investment.

Penalty. The penalty for each of these offences is a modest fine⁸²¹. However, the convicted person incurs an additional penalty of up to 6 months imprisonment if he has had a previous conviction within five years prior to the present conviction or if he was or is an employee of the business exploiting the patent. The court must additionally order confiscation of and delivery up to the patentee the pirated products.

No prosecution without complaint. No prosecution for an offence under the section may be commenced without the complaint of the patentee.

3.3. Trade designs and patterns

Section 329 creates and punishes the offence of infringing a registered design

⁸²⁰ In *Windsurfing International Inc v. Tabur Marine (GB) Ltd* [1985] RPC 59, the plaintiffs, first manufacturers of the first commercial windsurfer/sailboard patented their design for sailboard. They successfully sued defendants for patent infringement as a result of making and selling a similar sailboard in the UK.

⁸²¹ From 50 000 to 300 000 francs.

or pattern. In the English case of *Interlego Ag v. Tyco Industries Incorporation*⁸²², the court held that an article qualified as a design if its features or configurations, taken as a whole, had ‘eye appeal’ even though there were some features which were dictated by purely functional requirements. The shape of the lego bricks were found to have not only eye-appeal but also significant features of outline and proportion which were not dictated by any mechanical function which the brick had to perform as part of the construction set. Unless every feature of the design is dictated by the function, which the title is to perform, the design of the article was in principle capable of registration as a registered design.⁸²³

Section 329 does not give protection to unregistered designs and patterns. The offence carries a modest fine⁸²⁴, but may additionally attract a custodial sentence of up to 6 months. The court has power to inflict the same accessory penalties as under the previous section. And, as in the previous section too no prosecution for this offence may be commenced without the complaint of the injured party.

3.4. Trademarks

Sub-section (1) of section 330 creates and punishes two offences, viz. *forging* a registered trademark, and *using a forged* registered trademark. In either offence it must be shown that the trademark was registered. It is not an offence under the section to forge or to use a forged unregistered trademark. Each of the offences under section 330(1) is punishable by imprisonment for from 3 months to 3 years and/or a fine⁸²⁵.

Sub-section (2) of the same section also creates and punishes two offences, namely, *imitating* (without forging) a trademark in manner liable to mislead a purchaser, and *using any imitation* trademark. The imitation must be of a registered trademark, and the use must be of an imitation of a registered trademark. The imitation need not have actually misled any purchaser; it is

⁸²² [1987] 1 AC 217.

⁸²³ A design may satisfy the requirements for registration yet be excluded from registrability: *Cow (BP) and Co Ltd v. Cannon Pty Ltd* [1970] RPC 397 (an alleged infringer failed to have the registration of the design of a rubber hot water bottle with a series of diagonally arranged ribs on both sides of the bottle: the development by rival manufacturers of other designs for hot water bottles, the court said, was not prevented); *Lamson Industries Ltd's Application* [1978] RPC 1 (application to register computer paper with alternating horizontal bands of white and light green: rejected because the features were governed by the ultimate function of the article which was to facilitate the checking of figures on a computer printout); *Ford Motor Co. Ltd's Design Application* [1995] RPC 167 (application to register the designs of various motor vehicle components: rejected because the articles had no independent life as an article of commerce); *Masterman's Design* [1991] RPC 89 (application to register a Scotsman doll with a kilt and anatomically correct male genitalia exposed when the kilt is lifted: rejected on the grounds of morality).

⁸²⁴ From 50,000 to 300,000 francs.

⁸²⁵ Of from 50,000 to 300,000 francs.

sufficient that the imitation is *liable* to mislead a purchaser into thinking it is an original genuine product. For example, in *William Bailey (Birmingham) Limited's Application*⁸²⁶, the court held that the mark 'Erectiko' is similar to the mark 'Erector' and hence likely to cause confusion to the public as it relates to the same product.

In every case the prosecution must prove that the sign or symbol is a trademark. Where the sign or trademark has been duly or properly registered as a trademark the fact may be taken as conclusive of the issue whether it is a registrable sign or symbol. But the issue could arise where registration is impugned or opposed. In *Smith Kline and French Labs. v. Sterling Winthrop Group Ltd*⁸²⁷, the respondent opposed the appellants' application to register ten colour combinations used on various drug capsules to distinguish the sustained release drugs contained in them. Most of the drugs were available on prescription but there was sufficient evidence to show that widespread marketing and sales had made these colours distinctive of the appellants' product. The House of Lords held that distinctiveness was the important factor and the coloured capsules had become distinctive through use.

In *Coca Cola Trademark Applications*⁸²⁸, the manufacturers of Coca Cola failed to register the shape of the Coca Cola bottle as a trademark on the reasoning that it would be inappropriate to grant a monopoly which would hamper the production of similar containers and that the goods of rival traders should be distinguished using labeling. Lord Templeman stated,

"It is not sufficient for the coca cola bottle to be distinctive. The coca cola company must succeed in startling proposition that the bottle is a trade mark, if so, then any other container or any article of a distinctive shape is capable of being a trademark. This raises the spectre of a total and perpetual monopoly in containers and articles..."

This statement echoes that of Lindley J in *James's Trade Mark* (1886),

"A mark must be something different from the thing marked. A thing cannot be a mark of itself."

Both statements are no longer good law. Trademark law now extends protection to devices or shapes. The House of Lords was thus able to hold in *Reckitt and Colman Products Ltd v. Borden Inc*⁸²⁹ that appellants' yellow plastic container shaped like a lemon and in which he sold 'Jif' lemon juice "has acquired, as it were, a secondary significance [as] it indicates not merely lemon

⁸²⁶ [1935] 52 RPC 136.

⁸²⁷ [1975] 2 All E.R. 578.

⁸²⁸ [1986] RPC 421.

⁸²⁹ [1990] 1 All E.R. 873.

juice but specifically Jif leman juice.” The respondents who had produced a similar shaped container, which was slightly larger, were held liable in ‘passing off’ and a *quia timet* injunction was granted against them.

Each of the offences under the sub-section (2) of s. 330 is punishable by imprisonment for from 1 month to 1 year and/or a fine⁸³⁰. Upon conviction of the accused the court is required to order confiscation of the goods having the forged or counterfeit trademarks, and also to order the disqualification of the offender for up to 10 years from voting at or being voted to any chamber of commerce (a disqualification of doubtful value).

3.5. Commercial confidence (trade secrets)

Businesses have trade secrets. Trade secrets are information of a business or technical nature that have commercial value and have been kept confidential. They often include secret processes, mixture of ingredients, recipes, know-how or any other confidential information such as list of customers that may give a competitive edge or may otherwise be valuable. The main purpose of the law is to prevent a person making wrongful use of information beyond the purpose for which it was imparted to him and to prevent the further disclosure of such information by him.

In *R. v. Department of Health*⁸³¹, Simon J stated that there are four main classes of information traditionally regarded as confidential: trade secrets, personal confidences, government information, and artistic and literary confidences. In that case the use of information about patients’ prescriptions, which had been converted into an anonymous form, was acceptable. The purpose of the law of confidence in such circumstances was to protect personal confidences and this did not give the patients a property right in the information.

Section 311(1) punishes the revelation of “any confidential fact or process” which has come to a person’s knowledge or “which has been confided to him solely by reason of his employment in an industrial or commercial undertaking.” The section punishes the disclosure of trade secrets.

It must be shown that what was disclosed (it matters not to whom the disclosure was made) was a ‘confidential fact’ or ‘a confidential process’. In *Coco v. AN Clark (Engineers) Ltd*⁸³², the plaintiff, Marco Paolo Coco, developed the ‘Coco’ moped engine, which featured, inter alia, some engine parts. He entered into negotiations with the defendants with a view to them ultimately manufacturing it. After approximately four months of discussions the defendants broke off negotiations, alleging difficulties with the transmission design. The defendant then wrote to the plaintiff offering him a royalty of 5

⁸³⁰ From 50 000 to 150 000 francs.

⁸³¹ [2001] FSR 74.

⁸³² [1969] RPC 41.

shillings per engine on the first 50 000 engines made, but this was not accepted. The defendants subsequently manufactured and sold their own 'scamp' moped. They admitted that the piston and carburetor were of the same type as the plaintiff's. The plaintiff sought an injunction against the manufacture and sale of any machines in which the defendants had made use, directly or indirectly, of any confidential information the property of the plaintiff.

Megarry J stated three elements normally required if, apart from contract, a case of breach of confidence is to succeed: the information itself must have the necessary quality of confidence about it; the information must have been imparted in circumstances importing an obligation of confidence; and there must be an unauthorized use of that information to the detriment of the party communicating it. On the evidence the court held that it was not clear that the nature of the information was confidential, and that the plaintiff had not established a clear misuse of the information. The court accordingly declined to grant the injunction applied for.

Simply marking a document 'secret' or 'private and confidential' does not suffice to make the document so marked qualify as confidential if the information is already in the public domain. In *Dalrymple's Application*⁸³³, a manufacturer distributed over 1000 technical bulletins containing information about a new manufacturing process to members of a trade association. The bulletin was marked 'confidential' and contained a note that the contents of the bulletin should not be disclosed to non members. The court refused to find that the information was confidential because the association had not taken sufficient steps to ensure that non-members did not access the information.

Similarly, in *Mustard & Sons v. Dosen*⁸³⁴, the court held that secret information concerning the details of an invention, which was the subject of a patent application, had lost its confidential character as soon as it had been published in a patent application. The Patent Office Register is a public document. It was accepted that the general public would be unlikely to actually access the Register. Nevertheless, the information was considered to be in the public domain and therefore was not protected by the law of confidence.

It is a defence to show that the matter revealed is neither a 'confidential fact' nor a 'confidential process'. It is also a defence to show that the defendant did not know and could not reasonably have been expected to believe that the matter was 'confidential fact' or 'confidential process'.

In *Thomas Marshall (Exports) Ltd v. Guinle*⁸³⁵, the defendant, Guinle, was the managing director of the plaintiff company for a period of ten years during

⁸³³ [19..] RPC 449

⁸³⁴ [1963] 3 All E.R. 416.

⁸³⁵ [1979] 1 Ch. 227.

which time he was involved in the company's imported clothing business. The defendant's contract of employment provided that he was not to engage in any other business without the company's consent while he was employed as managing director; that during and after his employment, he was not to disclose confidential information in relation to the affairs, customs or trade secrets of the company and its group; and that after ceasing to be managing director he was not, *inter alia*, to use or disclose confidential information about the suppliers and customers of the group.

Without the company's knowledge, the defendant began to trade on his own account and on behalf of his two companies in competition with company's customers. The defendant purported to resign as managing director at a time when his contract had another 4½ years to run. The company applied for interim injunctions to restrain the defendant, *inter alia*, from disclosing or using any confidential information or trade secret of the company during or after his employment. It was held that the court would restrain the defendant from continuing further breaches of his employment contract and that an interim injunction would be granted in respect of the defendant's breach of the obligations of fidelity and good faith to his employer.

Megarry V-C formulated the following requirements to be satisfied if information was to be considered as confidential: the information must be such that the owner reasonably believes that its release would be injurious to him, or would be advantageous to his rivals or to others; the owner of the information must reasonably believe that the information is confidential or secret and not already in the public domain; the information must be judged in the light of the usage and practices of the particular industry or trade concerned.

Where it is alleged that the confidential fact or process came to the knowledge of the defendant, it is not necessary to show how that happened. He may have, like the industrial spy, stolen it. Someone may have carelessly or mistakenly brought it to his attention. He may have accidentally stumbled on it. He may have got the confidential fact through eavesdropping. A talkative person may have unwittingly given away the secret. It does not matter.

But where the charge recites that the confidential fact or process was confided (*i.e.* entrusted) to the accused, the prosecution must show that such matter was confided in him solely by virtue of his capacity or status as an employee of the business or industry. An employee owes a duty of confidence to his employer and this duty may be expressly stated in the contract of employment. In the absence of an express contractual provision the employer who wishes to maintain confidentiality will have to rely on an implied duty of confidence to prevent unauthorized disclosure or use.

The employer is often most concerned about 'trade secrets' which have been passed on to the employee or which the employee has acquired during

the course of employment. In *Hivac Ltd v. Park Royal Scientific Instruments Ltd*⁸³⁶, the plaintiff company manufactured small thermionic valves for use in hearing aids, being at the end of the war the only company in Britain to do so. Five of its skilled manual workers worked on Sunday for the defendant company, which had been established to make hearing aids with valves that competed with the plaintiff's. The plaintiff was subject to the Essential Work Order and so could not dismiss the five, who by contract were subject to 24 hours notice, without following a complex statutory procedure. It sought interlocutory relief enjoining the defendant from procuring breach by the workers of their employment contracts. The court found in favour of the plaintiff and granted the injunction.

Similarly, in *Printers & Finishers v. Holloway*⁸³⁷, the court granted an injunction against using confidential information (documentary material) he acquired from his employer. In that case, the defendant, manager of the plaintiff company's flock printing plant, showed a director and employee of Vita-Tex around the plant. The plant had been set up under a confidential know-how agreement and the defendant was under instructions to keep the process involved secret. He removed some secret documents and copied others. He also ordered a machine part for Vita-Tex from the know-how licensor. He then left his employ. The plaintiff began proceedings against him, two Vita-Tex directors and Vita-Tex itself for various injunctions relating to breach of confidence.

It is a complete defence to a charge under the section to show that the 'person interested in secrecy' (i.e. the secret holder or the subject of the secret) authorized the revelation of the confidential matter or process. A person convicted under the section is liable to imprisonment for from 3 months to 3 years and/or a fine⁸³⁸. In addition the court may order the forfeitures described by section 30 of the Code.

§4. Protection of creditors against delinquent debtors

A vibrant economic system is built on credit. Even States borrow. Individuals and businesses borrow. They do so in a variety of ways and from different lenders. The law regulates this aspect of business activity, for even in a 'free market economy' the law does not shy away from regulating aspects of the economy. The law thus intervenes to protect the borrower and the lender, the debtor and the creditor. The law of usury, for example, protects the borrower by setting limits on the amount of interest the creditor can legally charged for lending.

⁸³⁶ [1946] 1 All E.R. 350.

⁸³⁷ [1965] 1 W.L.R. 1.

⁸³⁸ From 100 000 to 5 million francs.

Historical. The law also protects the creditor by providing him with various remedies if the debtor does not pay his debt. Nowadays the law's treatment of the debtor is far more benign than was the case in yesteryears. In the old days in England, for example, a person who was unable or unwilling to pay his debt was often thrown into a prison for debtors, where he remained, sometimes for years, waiting for friends or family to raise funds to repay the debt or until the creditor agreed to his release. In some rare instances the debtor agreed to some form of indentured servitude, whereby he worked for a pre-set number of years at little or no salary to repay the debt. This practice is now a thing of the distant past. Modern law treats defaulting debtors far less harshly.

No imprisonment for debt. Many people contract debts. Some do so honestly but afterwards behave dishonestly towards their creditors.

Even so, the law is wary of the debtor who behaves badly towards his creditor. The debtor may fail to pay his debt. He may with the creditor's agreement get his debt reduced or deferred. That by itself is not a criminal offence, no matter the duration of the obligation to pay the money owed. The debtor cannot be imprisoned just because he owes a debt. The creditor has a civil remedy. He can sue for his debt. The police cannot assume the role of debt-collector. There are people who collect debts for creditors as a job. A creditor may thus recover the money owed him by employing the services of a debt-collector or by suing in the civil courts. A debtor may hide from his creditor or seek to postpone the date of performance of his obligation to pay the debt. The criminal law leaves him alone, and the creditor has no right to arrest him.

This does not mean that the delinquent debtor enjoys immunity from criminal process. The criminal law will visit him if he salts his property away by transferring it to a third party or if he otherwise deals with his property in such a way as to defraud his creditor. If a debtor falls on really hard times and finds that his assets cannot satisfy his debts or that he cannot pay his debts as they come due it might be an honest thing for him to opt for bankruptcy or insolvency.

Bankruptcy. A bankrupt is a person who has had a bankruptcy order made against him and whose estate is administered by a trustee in bankruptcy for the benefit of the bankrupt's creditors. An insolvent is a person who is unable to pay his debts in full as they become due. Insolvency may be dealt with by means of 'individual voluntary arrangement' or by bankruptcy.

Bankruptcy is the process by which an insolvent individual or business is made bankrupt and the estate administered for the benefit of creditors. Bankruptcy proceedings (voluntary or involuntary) are initiated by a petition, upon which the High Court may make a bankruptcy order. In a voluntary

bankruptcy it is the debtor who files the petition in the High Court, while in an involuntary bankruptcy it is the creditors who do so. A debtor (person or business) is bankrupt when so declared by a bankruptcy order of the Court. Generally, the court would adjudge the debtor bankrupt if he owes at least a certain statutorily fixed minimum amount to a creditor or to creditors, and he has committed an 'act of bankruptcy' within a certain period of time immediately preceding the filing of the bankruptcy petition.

One such 'act of bankruptcy', is the common one of fraudulently transferring property in an attempt to defraud creditors, as where **A** gives or sells his house to **B** for less than its value when **A** realizes that his creditors are after him; or where **A** sells all his shares in a business and absconds from the country taking the cash with him. Another common act of bankruptcy is that in which the debtor makes a preferential transfer of his property shortly before filing the bankruptcy petition, as where **A** is insolvent and he pays off some of his creditors in full, with the result that there is nothing left over for the others, or at least not enough to go around. Other acts of bankruptcy include: a general assignment by the debtor for the benefit of his creditors; and an admission in writing by the debtor that he is unable to pay his debts and is willing to be adjudged or declared a bankrupt by the court.

When a bankruptcy petition is filed against the debtor he is required by law to file certain papers among which are two key documents: a schedule, listing all his creditors and all details of his property and assets; and, a statement of affairs, setting forth all necessary information regarding his financial condition. It is a criminal offence for the debtor to conceal or remove his assets, unless the property is statutorily exempted from the proceedings. Any debt the debtor fails to list will not be discharged by the bankruptcy order.

After a bankruptcy order is made a trustee in bankruptcy (a qualified insolvency practitioner such as a liquidator or a receiver) administers the debtor's estate, as the person in whom, upon his appointment, the estate vests automatically. Part of the job of the trustee in bankruptcy is to uncover any irregular dealings that violate the law on bankruptcy (such as fraudulent and preferential transfers), locate property concealed or removed, and see to it that creditors are treated fairly and equally. When he has received the claim by all the creditors the trustee will get permission to liquidate, or sell the assets of the bankrupt to raise the money to pay off the creditors. The law prescribes an order of priority of payment for creditors beginning with 'secured creditors', 'prior claimants', and so on down to 'general creditors'.

A bankrupt is required to co-operate fully in the bankruptcy proceedings. He may thus be found criminally liable for various acts of unhelpfulness such as fraudulent acts committed shortly before the presentation of the bankruptcy petition, or the disposal of property obtained on credit shortly before becoming bankrupt (unless he can show that the disposal was in the ordinary

course of trade or that he had no intent to defraud). A bankrupt also invites visitation by the criminal law if, being engaged in trade or business, he has materially contributed to the insolvency by gambling, or by rash and hazardous speculations unconnected with his trade or business. An undischarged bankrupt who obtains credit by fraud, or who gets goods and services on credit without disclosing to the creditor that he is an undischarged bankrupt may find himself in the dock.

The whole philosophy of today's bankruptcy law is to give the honest debtor an opportunity to throw in the towel when his debts get unbearable and unpayable, and to make a new financial start. In general, a bankrupt is usually automatically discharged after a short period of time (say three years) from the start of the bankruptcy. Bankruptcy is thus a form of 'legal surgery'. Since bankruptcy proceedings are authorized by law and are established to enable the honest debtor to receive a full discharge from his debts, to be declared a bankrupt cannot be considered dishonourable and immoral. Moreover, the extraordinary growth of credit in recent years, with all kinds of business owners in effect making loans available, some through credit cards, has led to a more lenient or tolerant attitude towards delinquent debtors.

The Penal Code in sections 331 to 336 inclusive creates a number of offences punishing the fraudulent debtor, the unhelpfulness of the insolvent trader, the fraudulent creditor, and culpable and fraudulent bankruptcy. The noun 'trader' occurs frequently in these sections. That word means the same thing as tradesperson or businessperson.

4.1. Fraudulent debtor

Section 331(1) punishes with imprisonment for from 15 days to 1 year "any debtor, whether or not a trader, who with intent to avoid payment to one or more creditors gives, delivers, transfers, encumbers, removes or conceals the whole or any part of his property."

Each of the six action verbs (gives, delivers, transfers, encumbers, removes, conceals) in the sub-section constitutes a distinct offence. In other words, it is an offence for the debtor:

- to give away his property with intent to avoid payment to his creditor;
- to deliver up his property with intent to avoid payment to his creditor;
- to transfer his property with intent to avoid payment to his creditor;
- to encumber his property with intent to avoid payment to his creditor;
- to remove his property with intent to avoid payment to his creditor;
- and
- to conceal his property with intent to avoid payment to his creditor.

An intention to avoid payment is an intention to evade or get out of fulfilling or performing the obligation to pay the debt.

That intention does not necessarily mean an intention permanently to

escape from paying the debt. Avoiding payment is a unilateral operation on the part of the debtor. It leaves the obligation to pay the debt untouched. When the avoidance ceases the creditor may seek to recover the debt in any way open to him.

Any of the offences under the section is consummated irrespective of whether the debtor is a trader or not, whether or not the debt is owed to one or more creditors and whether or not it is the whole property that is involved or only part of it. However, the prosecution must, in addition to proving the general criminal intention as required by section 74, go further to prove that the debtor acted with the specific intent (ulterior or oblique intent) to avoid payment. This is not always easy as a businessperson might convincingly argue that his act is in no way indicative of an intention to avoid paying his debts, or that his act was done in the ordinary course of trade. In order to surmount this particular difficulty section 331(2) helps the prosecutor by providing that the intention to avoid payment is presumed “in case of removal or concealment within two months before the judgment against the offender.”

In other words, where the debtor removes or conceals his property within two months before the date of the unsatisfied judgment against him the law presumes that the concealment or removal was done with the intention of avoiding payment to his creditor. This presumption partakes of a basic procedural rule allocating the incidence of the burden of proof. The prosecution may avail itself of this presumption only if it proves certain basic facts: ‘removal or concealment’ of the property ‘within two months’ before the ‘judgment against’ the debtor. Proof of these basic facts will establish the presumed fact (that the debtor intended to avoid payment of his debt) only in the absence of evidence contradicting such fact. The effect of the presumption in section 331(2) is thus that it casts upon the debtor not a burden of proof but a burden of adducing evidence contradicting the basic facts proved by the prosecution.

4.2. Culpable bankruptcy

The very poorly and hopelessly drafted section 332 creates and punishes with imprisonment for from 1 month to 2 years a wide range of offences, most of which are capable of being committed only by a trader.

Under section 332(1) it is an offence for *a trader*:

- To exaggerate his personal or household expenses, resulting in his insolvency or following his insolvency;
- To spend large sums on operations of pure chance, resulting in his insolvency or following his insolvency;
- To spend large sums on fictitious dealings in securities or in goods, resulting in his insolvency or following his insolvency;
- To contract on account of another without receiving consideration,

obligations, which in view of his position at the time were unreasonable, resulting in his insolvency or following his insolvency.

An insolvent trader commits an offence within the meaning of Section 332(2) if he:

- Engages in purchases for sale below the market price;
- Engages in loans or negotiations of paper or other extravagant means of obtaining funds;
- Prefers one creditor to the rest;
- Fails to lodge in the registry, within 15 days of insolvency, the complete statement required by law.

A trader adjudged a bankrupt is guilty of an offence under section 332(3) if:

- He is again declared a bankrupt before compliance with a previous deed of arrangement;
- He has infringed the regulations governing the business register;
- He has kept no books and made no exact inventory;
- He has kept his books but has made his inventory incompletely or irregularly (i.e. disorderly; not in conformity with how an inventory is required to be made);
- He has kept his books or made his inventories without fraud but nevertheless they do not show a true state of his assets and liabilities;
- He fails, without reasonable excuse, to present himself personally to the trustees in the cases and within the time prescribed.

Sub-section (4) of section 332 makes it an offence for any banker or any broker to become insolvent. It is an ambitious provision of little practical value.

4.3. Fraudulent bankruptcy

It is fraudulent bankruptcy for any insolvent trader: to remove his books; to convert any part of his assets; to conceal any part of his assets; or to acknowledge (in his books, balance sheet, or by any document whether notarial or otherwise) debts he does not owe.⁸³⁹

The insolvent trader found guilty of any of these offences incurs a stiff

⁸³⁹ Section 333 (1).

penalty, which is imprisonment for from 5 to 10 years. This penalty is doubled where the trader is a banker or a broker.⁸⁴⁰

4.4. Culpable bankruptcy-related acts by corporate agents

Section 334 punishes acts committed by persons empowered to act on behalf of a corporation or partnership. Persons so empowered to act are the agents of the partnership or corporate entity. These are usually the principal officers of the corporation or, in the case of a partnership, each of the partners. The liability here is that of the corporation acting through its agents. But oddly the agent is sentenced to a custodial penalty.

A corporation is a legal person, distinct from the human corporators who constitute the framework. Nevertheless, it is criminally liable either under the theory of vicarious responsibility or under the identification doctrine. That doctrine has it that the corporation is identified with its controlling officers, the 'brain' of the corporation, whose acts and states of mind are imputed to the corporation itself. Corporate liability exemplifies utilitarian theory in the criminal law, and is based not on the theory of justice but upon the need for deterrence.

A fine can be slapped on the corporation, but not a custodial penalty because the corporation is an abstraction. As a legal fiction its physical embodiment is only a piece of paper. The corporation has no feeling. It cannot become stressful, even upon being convicted. It has no physical body and so cannot be put behind bars.

Section 334(1) in effect makes the agent the statutory whipping boy (scapegoat) for what are in reality the offences of the corporation or partnership. But the attitude of the lawmaker appears to be that criminal responsibility here should be human because in the last resort only human beings can be punished with imprisonment, which is the only form of punishment provided under the sub-section. Furthermore, the offences in s. 334 are intentional offences (i.e. offences requiring criminal intention) and on principle a corporation cannot be convicted of an offence requiring *mens rea* (except, of course if one presses in the identification doctrine).

This difficulty clearly does not arise in the case of a sole trader or a partnership, because here the human beings carrying on the business can have *mens rea*.

By section 334(1) an agent of a corporation or partnership and acting in that capacity incurs a penalty of imprisonment of from 1 month to 2 years if he:

- Spends large sums on operations of pure chance, resulting in his insolvency or following his insolvency;

⁸⁴⁰ Section 333 (2).

- Spends large sums on fictitious dealings in securities or in goods, resulting in his insolvency or following his insolvency;
- Contracts on account of another without receiving consideration, obligations which in view of his position at the time were unreasonable, resulting in his insolvency or following his insolvency;
- Engages in purchases for sale below the market price;
- Engages in loans or negotiations of paper or other extravagant means of obtaining funds;
- Prefers one creditor to the rest;
- Has kept no books and made no exact inventory;
- Has kept his books but has made his inventory incompletely or irregularly;
- Has kept his books or made his inventories without fraud but nevertheless they do not show a true state of his assets and liabilities;
- Converts any part of his property with intent to withdraw the whole or any part of his own property from the claims of a corporation or partnership which has ceased payment (i.e. has become insolvent) or from those of the shareholders or partners or of the creditors of the corporation or partnership;
- Conceals any part of his property with intent to withdraw the whole or any part of his own property from the claims of a corporation or partnership which has ceased payment (i.e. has become insolvent) or from those of the shareholders or partners or of the creditors of the corporation or partnership;
- Acknowledges debts which he does not owe with intent to withdraw the whole or any part of his own property from the claims of a corporation or partnership which has ceased payment (i.e. has become insolvent) or from those of the shareholders or partners or of the creditors of the corporation or partnership.

An agent acting for a corporation or partnership also offends against the criminal law and is punishable by imprisonment for from 5 to 10 years if he: removes his books; or converts any part of his assets; or conceals any part of his asset; or acknowledges (in his books, balance sheet or any document whatsoever) debts which he does not owe.⁸⁴¹

It does not seem a credible defence under the section for the agent to shift or 'pass on' the blame to the principal by showing that he was blatantly 'leaned on' or subtly influenced by pressure from the principal. However, if the agent can prove that he acted under a perfectly honest misapprehension (difficult

⁸⁴¹ Section 334(2).

under the section) this fact would negative criminal intent, freeing him from inculcation.

4.5. Offences other than by debtors

Section 335 punishes various fraudulent acts committed in the interest of the insolvent trader. Anyone who, acting in the interest of an insolvent trader, removes or conceals any of the insolvent trader's property is guilty of an offence and liable to imprisonment for from 5 to 10 years. Again, anyone who in insolvency proceedings makes proof directly or indirectly of a false debt is guilty of an offence and also liable to imprisonment for from 5 to 10 years.

Further still, any relative of the insolvent trader (whether a spouse, an ascendant or a descendant) acting as an accessory or otherwise, who converts or conceals any asset of the insolvent trader commits an offence and is liable to imprisonment for from 1 to 5 years.

4.6. Fraudulent creditors

Section 336 punishes the creditor who after the commencement of insolvency proceedings commits certain fraudulent acts. If he agrees to receive (whether from the insolvent or from another) any private advantage in consideration of his vote in the insolvency proceedings he commits an offence punishable by imprisonment of from 1 month to 1 year and a fine⁸⁴². He incurs a like penalty if he makes any private agreement for preference in the distribution of the assets of the insolvency.

Where a trustee commits any of these offences the penalty incurred is doubled.

§5. Protection of individuals against confidence tricksters

5.1. Signature in blank

A person has section 309 to reckon with if he abuses the confidence of another by inserting an unauthorized obligation in a signed blank paper entrusted to him. That section provides that a person incurs a penalty of up to five years imprisonment and/or a fine⁸⁴³ if "being entrusted with a signed blank paper [he] takes advantage of it to insert any unauthorized obligation, discharge.

In *The People v. Tanyi Mbiyonyor Samuel* (1978)⁸⁴⁴ a count in the seven-count charge against the appellant alleged that the appellant "having been entrusted with a blank paper to wit, Bamenda Civil Servants' Credit Union Loan

⁸⁴² From 20 000 to 500 000 francs.

⁸⁴³ From 5 000 to 500 000 francs.

or disposition or any other writing liable to harm the signatory in his person or in his substance."

⁸⁴⁴ Criminal Appeal No. BCA/17.c/78, unreported.

Application and Agreement Form which was signed by Mrs. C. Galabe, took advantage of it to insert an unauthorized obligation to the effect that Mrs. C. Galabe had stood surety for [him] to the extent of 105 000 francs for a loan of 500 000 francs which [he was] applying for from the said Union, and thereby committed an offence contrary to and punishable under section 309 of the Penal Code.”

The words “liable to harm the signatory in his person or in his substance” mean likely to affect detrimentally the person of the signatory or to cause him pecuniary or economic loss. The offence is committed as soon as the unauthorized obligation is inserted in the signed blank paper. It is therefore unnecessary for the prosecution to labour to show that a particular result ensued. Nor is it necessary to prove that the signatory’s person or pocket was indeed detrimentally affected. The law merely requires proof of a likelihood of him being so affected.

It must also be shown that the abuser was entrusted with the signed blank paper by the signatory himself or his agent. If the abuser stole the signed blank paper or obtained it by false pretences he cannot be charged under this section.

The nub of the offence is the insertion of an unauthorized writing in the signed blank paper. That being the case the prosecution must prove the specific writing that the signatory of the blank paper authorized the trustee thereof to insert therein. The defendant has a good defence if he can show that the insertion of the contested writing was by a third party.

5.2. Professional confidence (secret)

In general, information confided to lawyers, doctors and clergymen by clients or persons under their care is privileged. No court can compel that they repeat or divulge such information. The reason is that these professionals are often the subjects of confidences given in hours of physical or emotional strain. The close relationship between these professionals and consumers of their services entails that some information will pass between the parties, which is likely to be confidential. Because of this close or fiduciary relationship an obligation of confidence arises. The lawyer, doctor or priest owes a fiduciary duty to refrain from disclosing information confided in them by their clients, patients and penitents to third parties. The nature of such information is confidential because its disclosure might tend to incriminate the client or patient or penitent, as the case may be.

In certain cases, however, overriding public interest might outweigh private considerations. In *W v. Egdel*⁸⁴⁵, W killed five people and was diagnosed as suffering from paranoid schizophrenia. The court accepted his plea of diminished responsibility and ordered his detention under the Mental

⁸⁴⁵ [1989] 1 All E.R. 1089.

Health Act. Later, his condition improved. His doctor recommended him to be transferred to a regional secure unit. The Home Secretary refused his consent to transfer. W applied to a Mental Health tribunal for discharge or transfer. The doctor was instructed to examine W and make a report. The report was not favourable to W and the doctor sent a copy to W's solicitor in the belief that it would be placed before the tribunal, but W's solicitor withdrew the application for discharge or transfer.

The doctor was concerned that there will be no copy of the report on W's file for future references. He therefore sent a copy of his report to the Home Secretary. W complained that this was a breach of the confidential relationship between a patient and a doctor. The Court of Appeal held that though W had a personal interest to a duty of confidence by a doctor to his patient, this was not a matter of private but of public interest. The public interest in maintaining confidence had to be balanced against the public interest in protecting others from possible violence. In this case the public interest in restrictive disclosure outweighed the public interest of the doctor's patient.

One of the most important obligations that a lawyer takes on with his representation of his client is to keep secret and inviolate anything and everything that he learns about his client's private affairs while he represents him. This confidential relationship means that anything the client tells his lawyer is absolutely confidential unless the client authorizes him to disclose it to somebody else.

By section 310(1), it is an offence punishable by imprisonment for from 3 months to 3 years and a fine⁸⁴⁶ for anyone to reveal any confidential fact which has come to his knowledge or which has been confided to him solely by reason of his profession or duties.

The offence is committed only when the revelation of the secret was "without permission from the person interested in secrecy." The phrase 'person interested in secrecy' is a clumsy way of referring to the secret holder or the person who has the secret or the person interested in having the secret kept. No offence is committed if the revelation of the confidential fact was authorized by the secret holder.

The prosecution must prove that the fact divulged was indeed a confidential fact. A fact is confidential if it is one that is known about by only a few people or if it is one that is kept hidden from other people or if it is one that is not told or shared with other people. It must also be shown that the confidential fact was revealed, even if partially. How and where and to whom it was disclosed is immaterial. Also, it is immaterial how the confidential fact came to the knowledge of the defendant. If an employee has access to

⁸⁴⁶ From 20,000 to 100,000 francs. The punishment is doubled where the defendant is a public servant. Moreover, upon conviction the court may, in addition to the principal penalty, order the forfeitures described by section 30 of the Code.

classified material by virtue of his employment he would have had knowledge of the confidential facts in the classified material.

Where the charge alleges that the confidential fact was confided to the defendant who revealed it, then, the prosecution must prove that the fact was confided to him “solely by reason of his profession or duties.” Secrets confided to a person not by reason of his profession or duties are not protected. Confidants and confidantes, trusted with knowledge of one’s private affairs, sometimes abuse the confidence placed in them. People commonly confide a secret to their friends who then whisper it to their own friends and these friends whisper it in turn to their own friends and before long the matter has become public knowledge. It would be puerile for the secret holder (i.e. the owner of the secret) to report the indiscretion of his friends to the police. No offence has been committed, no arrest would be made and no charge would be laid.

The purpose for which the confidential fact was confided to the defendant is of no moment. It also does not matter who did the confiding. For example, it may have been confided by a client to counsel, or by a penitent to a priest, or by a patient to doctor, or by an employer to an employee. If an employee’s job consists in handling classified files he would thereby have access to confidential facts. In contemplation of law he has been confided such facts by his employer. The law relating to the preservation of secrets pertaining to national security makes it an offence for any person to communicate or divulge certain information.

A confidential fact that has come to the knowledge of a person or that has been confided to him may tend to suggest that a felony or a misdemeanour has been committed. Such a person commits no offence if, without permission from the secret holder, he reveals that confidential fact to either the police, or the prosecuting or court authorities. Section 310(2) exempts from the prohibition of unauthorized disclosure of professional confidences “statements to the prosecution or police concerning facts, which may amount to a felony or misdemeanour [and] answers in court to any question whatever.”

This however does not take away the defence of ‘privileged communications’ traditionally available to certain professionals by virtue of their calling. Counsel, minister of religion, doctor (except when called in his capacity as an expert witness), and public servant under orders in writing from the government to safeguard classified matter are thus not released from their general fiduciary duty to keep professional confidences.⁸⁴⁷

5.3. Corruption of employee

“Any employee in receipt of any form of emolument who without the permission of his employer receives any gift or accepts any promise for doing

⁸⁴⁷ Section 310 (3).

or omitting any act of his employment” is guilty of an offence under section 312 and liable to imprisonment for from 1 to 3 years and/or a fine⁸⁴⁸.

This offence might be called ‘private corruption’ in contradistinction to the offences of ‘official corruption’ in sections 134, 134a and 161, which carry a much heavier penalty. The term ‘employee’ must be construed in a wide sense to mean any private-sector worker irrespective of rank, as distinguished from a ‘public servant’ as defined in section 131 of the Code, which definition includes not just civil and military servants but also “any employee or official of the State or of any other body corporate governed by public law, or of a corporation or semipublic corporation.”

Section 312 does not penalize an employee for merely receiving a gift or for merely accepting a promise for doing or omitting any act of his employment.

An employee who does so offends against the section only if he receives a salary for the job he does *and* he was not authorized by his employer to receive the gift or accept the promise. Where the offence is committed the employee is the principal offender and the giver of the gift or maker of the promise, as the case may be, would be liable as accessory. In general, restaurateurs and publicans permit their waiters to take tips given by customers. If **A** gives **B**, a waitress, a generous *pourboire* for serving him, **B** commits no offence by accepting the tip

5.4. Forgery of a private document

This section differs from section 144, which penalizes ‘forgery of official act’ and section 205, which punishes forgery of ‘public act, document or record’. The offence under section 144 is capable of being committed only by “a public servant, notary, public auctioneer, bailiff or process-server.” Although the offence under section 205 is capable of being committed by anyone, the forgery must relate to a ‘public act, document or record’. Forgery under section 314 is also, as under section 205, capable of being committed by anyone. But unlike under section 144 and section 205, the forgery under section 314 must relate to a *private document*.

Section 314 (1) provides that anyone who *forges* or *alters*, whether in its substance or in the signature of parties or witnesses or in its date, any private document having the effect of an obligation, discharge or disposition shall be punished with imprisonment for from 3 to 8 years and with a fine⁸⁴⁹. Sub-section (3) of the section punishes in like manner anyone who *makes use* of any forged or altered private document or of an expired private document representing it to be still effective or of a private document referring to another person for whom he passes himself off.

⁸⁴⁸ From 50 000 to 500 000 francs.

⁸⁴⁹ From 50 000 to 1 million francs.

It is thus an offence under section 314

- To forge a private document;
- To alter a private document;
- To make use of a forged or altered private document;
- To make use of an expired private document representing it to be still effective;
- To make use of a private document referring to another person for whom he passes himself off.

The words ‘forge’ and ‘alter’ are not used conjunctively as indicating synonym. They are used disjunctively to indicate separate offences. A document is a forgery if it is not genuine either because it is an imitation or because some matter in it is fraudulent. A document is altered (and therefore necessarily forged) when any matter originally in it is in any way changed or expunged. An altered document is thus a forged document. But a forged document is not necessarily one that has been altered. For example, an otherwise genuine document (e.g. pay vouchers ready for the signature of the company director) fraudulently signed by someone who had no authority to do so (e.g. a dispatch clerk) is a forged document and not an altered document because nothing that already existed in the document has been changed, whether by way of erasure, obliteration, emendation, addition, or cancellation.

It follows that a count in an indictment that charges the accused with forging and altering will be bad for duplicity. It was so rightly held by the Bamenda Court of Appeal (Nyo’ Wakai, CJ, Nganje and Mbuagbaw, JJA) in the case of *The People v. Tanyi Mbianyor Samuel* (Nganje, J delivering the unanimous judgment of the Court).

The private nature of the document must be proved. The Code does not say what a private document is, even though this is a critical ingredient of the offence which must be made out. It may be said that a document is private if it is not a public or an official document. But this is not a helpful statement.

It must further be shown that the private document is one “having the effect of an obligation, discharge or disposition”. Any private document not having the effect of an obligation, discharge or disposition, such as an ordinary letter to a friend, does not fall with the terms of the section.

A document is something on which things are written, printed or inscribed, and which gives information. It includes a register, certificate, cheque, paper, book, voucher and even writing based on wood, stone or metal. The essence of a document is that it is something through which there is communicated an idea by writing, printing or other signs capable of conveying a definite meaning, irrespective of the language in which it is expressed. Thus a mechanical device such as a metre for measuring mileage, water, or electricity, or a clock is not a document. There is thus no forgery on the part of a worker

who at the approach of the 16:00 hours knock off time alters the time on the factory clock from 16:00 hours to 17:00 hours and thereby obtains an hour's overtime pay.

The forgery or alteration, as the case may be, must relate either to the substance of the document, or to the signature of the parties, or to the signature of the witnesses, or to the date of the document. It is forgery to insert a false date in a document. But it seems it is not forgery in terms of the section to insert in the document a false place of making. To make a fake or an imitation of a document is to forge it. To make additions to a document is a forgery. But to erase, obliterate or remove any matter from the document is to alter the document. To insert the name of someone else in a document is forgery because that amounts to a false representation that the person concerned has something to do with the document. If **A** sends a false news item to the editor of a newspaper that is not forgery; but if he signs it in the name of **B** a famous correspondent the document would be a forgery. If a mediocre and obscure songwriter sends a song to be published in a songbook, and signs it in the name of Michael Jackson the song would be a forgery. It is thus forgery to sign a document either in the name of another person or in the name of a non-existent person.

To alter, or add to, the amount on a voucher or a cheque is to make a forged document. Cases of this nature can be quite tricky. Suppose that **A** has a general authority from his employer to sign cheques. If he acts in excess of his authority by fraudulently signing a cheque for money that was not due, he cannot be convicted of forgery because the cheque is not a forged document. The law is otherwise where **A** signs the cheque on behalf of his employer after his authority to sign cheques had been withdrawn. **A** can be convicted of forgery. Here the cheque is a forged document because of the fraudulent representation by **A** that he is acting on behalf of his employer. By the same token **A** can properly be convicted of forgery if he cashes the cheque by means of a forged endorsement of the payee's name.

Again, supposing that **A** endorses a cheque not meant for him in the name of a fictitious person and then opens an account at the bank signing the specimen signature card and the paying in slip in the fictitious name. The fact that **A** uses the pretended name of a fictitious person does not amount to forgery because **A** presents the two documents as made by himself, not the fictitious person. The fact that he presents the two documents under a false name does not mean that the documents purport to be made by some person who does not exist. The bank officials know that they are dealing with **A**. The fact that they do not know his true name is immaterial. The document does not purport to have been made by or on behalf of anyone but **A**.

It may therefore be stated as a general rule that where a document is signed in a fictitious name and the maker acknowledges authorship of the document,

the said document does not purport to be made by some person who does not exist. He makes the document and passes it as a document made by himself though in an assumed name. It would be otherwise if he makes the document in an assumed name and passes it as a document made, not by himself, but by someone else, real or fictitious.

Where a person who makes use of a forged private document is himself the forger, separate counts should be laid, one alleging forgery of the private document and the other one alleging making use of a forged private document.⁸⁵⁰ If the forger cannot for some legitimate reason be prosecuted or convicted on the first count that fact will not exculpate him from the charge of making use of a forged document.

Sub-section (2) of section 314 is a mere penalty provision and creates no offence. It provides for a slightly higher penalty (5 to 10 years' imprisonment) and a fine⁸⁵¹ where the forged private document is a will, or is evidence of a land right⁸⁵², or is a power to sign a document evidencing a land right or a commercial or bank paper, or is a commercial paper (e.g. a ledger, a bill of lading) or bank paper (e.g. negotiable instruments such as bills of exchange, promissory notes, cheques, bank orders). A document is not a commercial paper simply because its author is a tradesman. A tradesman is capable of being convicted of forging not only a commercial paper but any other paper as well, and a person who is not a tradesman is capable of being convicted of forging a commercial paper as he can of any other paper.

Forging a cheque falls within the terms of section 314(2)(a) and not section 253, which deals with bad cheque cases. Similarly, making use of a forged or altered cheque, or will, or document evidencing a right in land, or document granting power to sign a commercial or bank paper, or document evidencing a right in land falls within the terms of section 314(3).

In *The People v. Anthony Patupe Haden* the Buea High Court had no difficulty in finding the defendant guilty also on the count of making use of a forged commercial paper contrary to section 314(3) after satisfying itself that a Postal Money Order is a commercial document.

Per Endeley, CJ,

"It is a notorious fact that the Post Office operates a commercial banking system. A Postal Money Order is clearly a bill of exchange, a nonnegotiable bill of exchange, within the letter and the spirit of the Bills of Exchange Ordinance. It is therefore a commercial document within the intendment of the Penal Code."

⁸⁵⁰ *The People v. Tanyi Mbianyor Samuel* (1978)

⁸⁵¹ From 100,000 to 2 million francs.

⁸⁵² *David Chesami Enongang & 2 Ors v The People* (1982), Appeal No.BCA/22.C/82, unreported, where the appellants forged and made use of an agreement in respect of purchase of land purported to have been made and issued to them by a local chief.

5.5. False and forged certificates

Under s. 315 any person who “forges or alters a private certificate or issues a false certificate, where such issue is not otherwise punished, or who makes use of a forged, altered or false private certificate” is guilty of a misdemeanour and liable to imprisonment for from 1 month to 1 year. The penalty here prescribed is doubled where the document involved is for example a medical certificate or a private document other than a will, a paper evidencing a right in land, a commercial paper, or a bank paper.

In terms of the section it is an offence

- To forge a private certificate;
- To alter a private certificate
- To issue a false certificate (where such issue is not otherwise punishable);
- To make use of a private certificate that is forged or altered or that is false.

The section deals with ‘private certificates’. The penalty for an offence under the section is lighter than for an offence under section 207, which deals with ‘official certificates’ punishable by imprisonment for from 6 months to 3 years. The penalty under section 315 is also lighter than the penalty for the offence of ‘false medical certificate’ (section 259), which is imprisonment for from 2 months to 3 years and a fine or imprisonment of up to 10 years where the member of the medical profession was corrupted to issue the false medical certificate.

A private certificate is forged or altered if it is made different or if an illegal copy of it is made in order to deceive people. If a lie is told in a certificate then the certificate is a forgery, as where a certificate falsely claims that A obtained a degree with distinction when all he was able to get was an ordinary pass.

To issue a false certificate is to produce or to give to someone a false certificate. A certificate is false if it is not genuine, but is made to look real to deceive people. An untrue statement in a writ that an order of a court had been obtained to sell A’s immovable property will render the writ a false document. To make use of a forged or false private certificate is to use it in order to get an advantage.

A certificate is a formal document that may be used to prove that the contents or facts it testifies to are true, for example, a birth/marriage/death certificate, an official document attesting that a person has completed a course of study or passed an examination, a qualification obtained after a course of study or examination. A certificate is official if it is issued by a public authority; it is private if it is issued by a private body or authority, for example, a baptismal certificate, a qualification conferred by a private body or organisation, a document issued by an individual in his private capacity such as a certificate of valuation by a valuer or a surveyor.

Sexual Offences

Sexual offences are those having sexual gratification as the offender's predominant or overt motivation in their commission. Some of these offences take the form of sexual aggression, consisting as they are of injury and affront to a non-consenting person (e.g., private indecency, rape). Others are breaches of sexual taboo, and are punishable even if the other party gave consent. Examples of this group of sexual offences are immoral earnings, prostitution, homosexuality, sodomy, bestiality, indecency with young people, and intercourse with severely subnormal persons such as idiots, imbeciles and morons.

By s. 295 (1) "whoever in any place, notwithstanding that it may not be open to the public, commits an indecent act in the presence of any person of either sex and without his consent shall be punished." The prescribed penalty is imprisonment for from fifteen days to two years and/or a fine⁸⁵³.

Any place. The place where the offence is committed is immaterial. The section speaks of 'any place', that is, a public or a private place. That being the case the additional group of words 'notwithstanding that it may not be open to the public' is redundant though the phrase may, arguably, have been added merely for emphasis. The victim of the offence is the person in whose presence the indecent act was committed.

Private. The crime is denoted as 'private indecency' not because of any requirement that it must have taken place in private. The question of privacy of the place (the nature of the place, the likelihood of third parties coming upon the scene, the time of the act) is, as already observed, immaterial. The private nature of the offence refers not to the place or time of the act but to the number of persons involved. The act will not be treated as 'private indecency' where more than two persons take part or are present.

Dual offence: person of either sex. The crime is a dual offence. It is capable of being committed by a man or a woman in the presence of a woman, or by a man or woman in the presence of a man. Indeed, the offence is capable of

⁸⁵³ Of from 10.000 to 100.000 francs. The penalty is doubled where the offence was committed under any of the following circumstances: the indecent act was accompanied by physical assault, the offender had authority over the victim, the offender has by statute or custom custody of the victim, the offender is a public servant or minister of religion, the offender was helped by one or more others in the commission of the offence. See, sections 295(2) and 298.

being committed by one spouse against the other, that is, one spouse can be convicted of committing an indecent act in the presence of the other spouse.

Consent relevant to liability as part of the physical element. Consent negatives a charge for private indecency. Absence of consent here is not simply a defence. It is an element of the *actus reus* of the offence, which the prosecution must prove. The offence is consummated only if the alleged victim did not consent to the indecent act being committed in his presence. Consent may be implied as where two people undress in a common changing room in order to change clothes or where they undress in a common shower room or a common bathing place in a stream to bathe or where a patient undresses in front of his treating doctor for a physical examination or a strip-tease in a night club or a client before a masseuse.

Indecency to a child under sixteen is a separate crime *eo nomine* under s. 346 and, there, the question of the victim's consent is irrelevant. Further, indecency to any minor between the sixteen and twenty-one age bracket is also a separate crime *eo nomine* under sections 347. It is therefore submitted that section 295 is confined to cases where the non-consenting party is a person above twenty-one years of age. Accordingly, the phrase 'any person of either sex' in section 295(1) should be read to mean any adult person of either sex. Where the victim, though an adult (i.e., aged over twenty-one) is a severely subnormal person (an idiot, an imbecile, a moron) or even a lunatic and he 'consented' to the indecent act the proper defence open to the accused is not consent (for the insane or the severely subnormal person cannot in law give valid consent) but reasonable mistake; provided he did not know of the mental deficiency and had no reason to suspect it.

Meaning of indecency. An act is indecent if it is overtly sexual and would appear to the ordinary right-minded person in this country as an affront to modesty and privacy. Many traditional dances and a good many musical clips shown on television are sexually very suggestive. But they do not offend our customary standards of modesty or decency. Moreover, with the exception of bestiality and, controversially, homosexuality and lesbianism, no sexual act is *per se* indecent, nor are the human sexual organs in themselves indecent. Much depends on the circumstances of the defendant's conduct, the relationship between the parties, the persistence of the conduct complained of, the age and sex of the complainant, the defendant's intention and the interpretation that the other party puts on his behaviour.

Thus, there is nothing intrinsically indecent in the act of sexual intercourse or in passionate kissing. But if **A** and **B** have sexual connection or engage in carnally suggestive kissing or in 'heavy petting' in the presence of **C** without his consent, both **A** and **B** can properly be convicted of an offence under

section 295(1). They must be taken to have intended their act to be indecent given the circumstances and nature of the act since it is not decent and normal for such acts to be done in the presence of especially a non-consenting third party. Besides, not having consented to the act being done in his presence, **C** would in all probability be disgusted by the behaviour of **A** and **B**.

Again the male and the female genitalia are not in themselves indecent. But if **A** in his birthday suit exposes his person to **B** without his consent or walks towards **B** making sexual signs or bodily simulating sexual intercourse or shows **B** a pornographic picture, **A** can be convicted of private indecency.

In the English case of *Roffe*⁸⁵⁴, the accused exposed his penis and walked towards a woman making indecent suggestions, but did not touch her. He was convicted of indecent assault (i.e. psychic assault) of the woman. In *Kimber*⁸⁵⁵, which was concerned with the statutory offence of indecent assault on a woman, the accused had alleged that the woman had consented to his actions. It was held that, since the *mens rea* required for the offence of indecent assault on a woman was intentionally causing the woman to apprehend immediate, or to sustain, unlawful personal violence, and since violence would not be unlawful if the woman had consented to it, an accused was entitled to be acquitted if because of his mistaken belief in consent he did not intend to lay hands on the woman without her consent, whether or not his mistake was reasonable.

A can also be convicted of indecency if, without **B**'s consent, he exposes his penis to **B** and pulls **B** towards him or if he touches **C**'s vagina or breast without her consent. In *Beale v. Kelly*⁸⁵⁶, **D** exposed his penis to a 14-year-old boy and invited him to handle it. The boy refused, whereupon **D** grabbed his arm and pulled the boy towards him. It was held that the conduct amounted to indecent assault. In *Mwanza v. The People*⁸⁵⁷, a Zambian case, a male police officer conducting a search deliberately stripped naked a woman suspected to have stolen some unspecified items. In convicting him of indecent assault the court said that "everybody knows, and the common practice is known, that men do not search women just as women do not search men. To break that custom is indecent." In *Court*⁸⁵⁸, **D**, a self-confessed 'buttock-fetishist' who worked as a shop assistant pulled an 11-year-old girl who came into his shop across his knees and spanked her 12 times on the buttocks. His appeal against conviction for indecent assault was dismissed by the House of Lords, which held that evidence of **D**'s buttock-fetish and hence of his indecent motive had properly been admitted by the lower court.

⁸⁵⁴ (1952) 36 Cr. App. R. 4 (CCA).

⁸⁵⁵ [1983] 3 All E. R. 316.

⁸⁵⁶ [1951] 2 All E. R. 763.

⁸⁵⁷ (1976) ZR 124.

⁸⁵⁸ [1988] 2 All E.R. 22.

Simulated intercourse or other form of indecency in the presence of a non-consenting person (i.e. an unwilling victim) also falls within the section. If a man masturbates himself or if a woman fingers herself in front of another person who does not consent to such act of gross indecency that person can be convicted under s. 295 (1) even though neither person touches the other.

The same applies, it is suggested, in the case of sexually obscene words or songs in the presence of a non-consenting person; for, uttering words or singing is an 'act'. But obscene telephone calls is not an indecent act *in the presence* of **V**. However, if the obscene call is made to **B** and obscene words are purposefully uttered so that **V** who is nearby should hear and **V** hears, that would amount to an indecent act in the presence of **V** and punishable under s. 295 (1).

The crime of private indecency therefore covers overtly sexual acts in the presence of a non-consenting party. It also covers any conduct that raises in the non-consenting party an apprehension of a sexual assault (psychic indecent assault) and any conduct involving touching of the non-consenting party but short of sexual connection (physical indecent assault). In *The People v. Okeke Okafor John*⁸⁵⁹, Endeley J held that from the moment a sexual assailant undresses himself or his victim or sets out so to do, he has committed or set out to commit an indecent act in the victim's presence. In the view of the learned Judge where a sexual assailant sexually assaults his or her victim the assailant thereby commits an indecent act on the victim and in the victim's presence.

Ambiguously indecent; inherently indecent; objectively not indecent. It seems from what has been said on the subject of indecency that an act and its surrounding circumstances would be indecent in three types of cases.⁸⁶⁰ The first type of case is where the act is not unambiguously indecent but is capable of being so considered, as in the case of *Court*. Second, where the act or incident, viewed objectively is inherently indecent. An example is where a person strips another naked in public or fondles the breast of an unwilling female: *Singh-Marwa*⁸⁶¹. In this sort of case the accused's motives are generally irrelevant: whether his motive is sexual gratification, embarrassment or humiliation of the victim, or whatever, is of no moment (except if the motive could be said to provide a lawful excuse). Supposing that a doctor by a false representation obtains consent to an intimate examination of a female patient which was not necessary. The examination is an indecent assault, whether the doctor's false representation was motivated by desire for sexual gratification or for some other reason unconnected with the patient's medical needs (such as

⁸⁵⁹ (1968) W.C.L.R. 60.

⁸⁶⁰ R Card, *Criminal Law*, pp. 244-245.

⁸⁶¹ (1995) 16 Cr App R 537.

private research). In *Mwanza* the motive of the male police officer in stripping the suspected female thief naked was apparently to search her person and perhaps not for sexual gratification. But that motive was irrelevant and therefore did not save him from conviction for indecent assault.

Thirdly, where the incident viewed objectively is incapable of being considered indecent. In *Leeson*⁸⁶², the accused kissed a girl without her consent, and later suggested that they should engage in sexual intercourse. Under this third type of case if the act or incident is objectively incapable of being considered indecent, the fact that the accused had an indecent motive will not make the incident or act indecent. In *George*⁸⁶³, the accused removed a shoe from a girl's foot and, as he admitted, he did so for purposes of sexual gratification. The court rejected the prosecution's submission that an assault was indecent if committed to satisfy an indecent motive in the accused's mind, even though there were no overt circumstances of indecency. It therefore held that there was no indecent assault on the facts. Suppose that a doctor conducts a medically necessary intimate examination of a 14-year-old female patient. On the authority of *George* the doctor is not guilty of an indecent assault even if he is also motivated by sexual gratification.

'In the presence of'. Section 295(1) requires that the indecent act be committed 'in the presence of' and not that it should be committed on or with a non-consenting party. Where the indecency involves an assault (i.e. any touching of the victim, however slight) the indictment would be laid under section 295(2) (as read with section 295(1)), which provides for a penalty of up to 4 years' imprisonment and a fine where the indecent act is accompanied by assault.

'In the presence of' does not mean that the victim must see the act. A prosecution under the section 295(1) would lie where the act was done in the physical presence of another even if he is blind, blindfolded or is in an adjoining room, provided it was without his consent. This means the blind person must at least be aware of the act, even though he does not see it. Consequently, a prosecution under the section will fail if the act was done when the alleged victim was asleep or was next door oblivious of what was going on; for in such a case the alleged victim is not aware of the indecent act. The provision contemplates cases in which the body of the other party is not in any way touched and there is no use of violence.

But, section 295 (2) applies if the indecent act is accompanied by assault on the victim, for example it is committed on a non-consenting person or in the forcible presence of a person as where a man is made to watch the raping of his wife or daughter. Where the indecent act is accompanied by assault on the

⁸⁶² (1968) 52 Cr App R 185.

⁸⁶³ [1956] Crim LR 52.

victim, then the offence is capable of being committed even against Sleeping Beauty or a person who is blind and deaf.

The following propositions may be made:

1. If a person commits an indecent act in the presence of another person of the same or the opposite sex without that person's consent he will be caught by section 295(1). Common cases are where a person exposes his person to another; where a man in the presence of a woman communicates to her verbally, or by sign or body language a message containing an invitation to or a suggestion of sexual immorality or impropriety (but a declaration of love however irritating or unwelcome it may be is no offence); where a person holds up a pornographic or other indecent photo to another person; where a person has sexual connection with another in the presence of a third party; where a person commits bestiality in the presence of another person.
2. If a person commits an indecent act on or with a person of the opposite sex without that person's consent, the appropriate offence to charge depends on whether the indecent act was forcible sexual intercourse or some other form of sexual gratification such as forcible fellatio, fingering, masturbation, buggery, or even forcible kissing or embracing. In the former case the crime to charge is rape under section 296 (or under section 298 where any of the aggravating factors stated in that section are present). In the latter case the charge should be laid under section 295(1) as read with section 295(2) and punishable under section 295(2).
3. If a person commits an indecent act on or with a person of the same sex (acts of homosexuality or lesbianism) with or without the other person's consent the offence to charge is homosexuality contrary to section 347A which proscribes homosexuality under pain of imprisonment of up to 5 years and a fine.
4. The offence under section 295(1) is consummated only where the indecent act is done by not more than two persons and in the presence of not more than one person, because the offence is characterised as 'private indecency'. The indecent act ceases to be private and becomes public where it is committed by more than two persons or in the presence of more than one person. Where the offence involves more than two offenders or more than one victim the proper charge to prefer is 'public indecency' against section 263, though the penalty for that offence is exactly the same as that provided for private indecency

under section 295. However, one is faced with the absurd situation where private indecency involving assault is punishable (section 295(2)) but not public indecency involving assault. If the punishment for public indecency is assumed to subsume cases of violent public indecency, the absurdity is even greater because it means violent private indecency carries a heavier punishment than violent public indecency. The person who touches the erotic parts of a non-consenting person is thus punishable more severely than another person who touches the selfsame parts of several non-consenting persons.

5. If a person forces another (e.g., under threat of death or grievous bodily harm) to watch a pornographic film or the raping of his spouse or child he is guilty of private indecency. Where **A** rapes **B** in the forced presence of **C**, **A** commits two offences: private indecency involving assault (section 295(2)) and rape (section 296). A two-count charge against him would be proper: the victim in the offence against section 295(2) is **C**, and in the offence against section 296 is **B**. If **A** was assisted by **D** who held a gun to **C**'s head or held a knife to his throat or fettered or otherwise restrained **C**, **D** can be charged with being an accessory (section 97) as well as with 'conditional threats' (section 302(2)).
6. For an offence under section 295 a subsequent marriage freely consented to between the offender and the victim, if above the age of puberty, bars the commencement or the continuation of any prosecution (sections 297, 73(2)) and expunges any conviction that may have been made, putting an end to the enforcement of all penalties (sections 297, 73(1)). A marriage freely entered into must have effectively taken place. A mere promise of a marriage or a mere marriage engagement will not do. And provided that a marriage has been freely contracted it matters not that it is customary or statutory in type.

§2. Rape

Definition. Rape within the meaning of s. 296 is committed when a man, by force or moral ascendancy, compels any female, irrespective of her age, to have sexual intercourse with him. Rape is thus committed when a male person compels a female person to submit to sexual intercourse with him.

At one time rape was regarded as intercourse by violence. Emphasis was placed on the violence that was supposed always to accompany the sexual intercourse. The act was considered simply as an egregiously aggravated form

of physical assault and therefore was punished as a crime against bodily integrity. Nowadays the emphasis is not on violence as such (since the crime may be committed without any actual violence being involved) but on the absence of willingness or valid consent to intercourse on the part of the female, that is, absence of her free and conscious permission to intercourse.⁸⁶⁴

Perpetrator of the offence. The section uses the neutral pronoun ‘whoever’ (i.e., regardless of who). It may therefore be thought that rape is capable of being perpetrated by anyone regardless of gender or age. In reality the pronoun is qualified by such other words as ‘sexual intercourse’ and ‘him’, the use whereof makes it clear that rape is a male-only offence. Indeed there are two classes of persons who are exempted from the law of rape as principal offenders, women and boys under the age of twelve.

Women. Ordinarily the term sexual intercourse is limited to penile-vaginal contact, that is to say, the insertion of a man’s penis into a woman’s vagina. It is therefore not possible for a woman to have sexual intercourse with another woman⁸⁶⁵. If a woman forcibly inserts her finger or an artificial male penis or some other object or instrument into another woman’s vagina she cannot, in this country, be convicted of rape on the so-called doctrine of rape by instrumentality⁸⁶⁶. The charge to lay in such a case should be either public indecency (section 263), private indecency (section 295(2)), indecency to child under 16 years of age (section 346(2)), indecency to minor between sixteen and twenty-one years of age (s. 347), or homosexuality (s. 347 A), depending on the age of the victim and on whether the act took place in private or in public, or whether it involved more than one victim.

However, although a woman cannot commit rape as a perpetrator (even if she compelled a man to have intercourse with her at gun point) she can, like a man, be guilty of accessory to rape by a man. Supposing that a woman, **A**, induces another woman, **B**, by threats or misrepresentations to submit to intercourse with a man, **C**. Or suppose that **A** physically restrains **B** while **C** has forcible intercourse with **B**. In either of these cases **C** is guilty as perpetrator of the rape and **A** as accessory to the rape. If **C** was unaware of the inducement or misrepresentation and honestly believed **B** consented to the

⁸⁶⁴ C Anyangwe, ‘The Law of Rape in Cameroon: Appraisal and Proposals for Reform,’ 25 *Revue Camerounaise de Droit*, 1983, p. 11.

⁸⁶⁵ A hermaphrodite is a bisexual person and is neither male nor female but both.

⁸⁶⁶ C Anyangwe, ‘The Law of Rape in Cameroon ...’, op. cit. In Australia, however, a court in December 1996 found an Australian woman, Susan Abraham, guilty of raping another woman prisoner in an intimate body search for drugs in the prison where both women were inmates. The conviction of the woman for rape was odd. The judge himself expressed the view that the victim’s story was too bizarre a story to tell if it was not true. See, *Zambia Daily Mail*, December 26, 1996.

intercourse, he will escape conviction for rape because of lack of criminal intention. In such a case **A** cannot, on principle, be convicted as accessory because there is no guilty act in the direct actor, **C**, to which **A** can be called accessory. According to the principles relating to participation in crime, there can be no accomplice if there is no perpetrator.

Still, in such a case the doctrine of innocent agency may be pressed in aid to hold **A** criminally liable. **A**, the apparent accessory becomes herself the principal perpetrator with **C**, the third part, being regarded as no more than an innocent agent or instrument.⁸⁶⁷ In *Cogan & Leak v. R*⁸⁶⁸, a husband, Leak, compelled his wife to have sexual intercourse with Cogan. The husband was cohabiting with his wife and therefore could not at that time have been convicted of personally perpetrating the offence of rape against her. It was then still hard to negate the rule at common law that a husband could not be convicted of raping his wife because, according to Matthew Hale, “for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.”⁸⁶⁹ In the face of that hard-to-negate rule at common law the court held that Leak was guilty of raping his wife through the innocent agency of Cogan who was found to lack the necessary *mens rea* for rape and was accordingly acquitted. Of course, the maxim of the law is *qui facit per alium facit per se*. The maxim might afford some additional justification for the decision in *Cogan*. Yet, a logical application of the decision in that case would mean, as Card⁸⁷⁰ rightly points out, that a woman who caused a man, who was innocent for some reason, to commit a rape would be guilty of rape as a perpetrator, notwithstanding that the definition of rape says that it can only be perpetrated personally by a man.

Under-12 boys. A boy under the age of twelve years cannot be convicted of rape as principal offender. Under our law a male person under the age of twelve is presumed to be incapable of having carnal knowledge.⁸⁷¹ This is an absolute presumption of law, *praesumptio juris et de jure*, and cannot be rebutted by showing that the accused has reached the full age of puberty even though he is below the age of twelve years.

The presumption proceeds from the grounds of impotency rather than the want of discretion. Puberty, which may indeed be attained before the age of twelve, is not necessary for rape. The irrebuttable presumption of law that an under-12 male is incapable of having sexual intercourse (and thus incapable of committing rape) is therefore probably anachronistic. All that is required for

⁸⁶⁷ For example, *Cogan* [1976] QB 217.

⁸⁶⁸ [1975] 2 All ER 1059.

⁸⁶⁹ *The History of the Pleas of the Crown*, vol 1, 1936, p. 629.

⁸⁷⁰ *Criminal Law*, p. 557.

⁸⁷¹ Schedule III (B), section 54.

rape, which is committed upon the slightest penetration, is an ability to have an erection, even if for just a few minutes. It follows therefore that an under-12 boy capable of having an erection is also capable of committing rape. However, this conclusion is of little practical importance since a person that young has no criminal capacity and cannot therefore be convicted or sentenced. By section 80(4) a person has full criminal responsibility only as from the age of eighteen years. A child less than ten years of age is *doli incapax* (section 80(1)).

A child between ten and fourteen years of age lacks criminal capacity and may be the subject only of such measures as are specially provided for under the laws on juvenile delinquency (section 80(2)). This would be so if the under-12 has a mischievous discretion or if he gave assistance to a rapist. Section 80(3) provides that for an offence committed by a person aged over 14 and 18 years responsibility shall be diminished. A boy whose age falls within that age bracket can thus be convicted of rape, though he will get off with a lighter sentence on account of diminished responsibility due to his immaturity. In *Kenneth Mbah v. The People* (1996)⁸⁷², the court sentenced a 16-year-old boy to 15 years' imprisonment for raping a 9-year-old girl. The facts of the case were quite simple. The accused was bathing in a stream completely naked. A little girl mischievously hid herself in a nearby bush and was watching him. The accused soon realized that a girl was hiding in the bush and furtively gazing at his nakedness. He ran out of the stream towards where the little girl was, grabbed her and forcibly had carnal knowledge of her. The charge was laid under section 346 (4), which ordinarily punishes by imprisonment for from 15 to 25 years indecency by way of rape committed against a child under the age of sixteen years.

The court did not advert its mind to the little girl's mischievously indecent curiosity. But even if it had done so the girl's indecent curiosity would probably have served merely as a mitigating factor. It would definitely not have saved the accused from a conviction. Long ago, it was held in the English case of *R. v. Tyrrell*⁸⁷³ that a girl under 16 years of age could not be convicted of aiding or inciting unlawful sexual intercourse with herself. In the view of the court, to hold otherwise would mean offences in respect of females also create an offence in the female, e.g. a female being convicted of aiding or abetting her being raped. This would be ludicrous. On the persuasive authority of *Tyrrell* therefore, it would have been an idle defence for the accused in *Kenneth Mbah v. The People* to argue that the little girl aided or incited her being raped.

'Wife-rape'. The victim of rape under section 296 can only be a female. The section talks of 'any female', which is any person of the feminine gender

⁸⁷² *Cameroon Herald*, July 12-14, 1996, p. 5.

⁸⁷³ [1894] 1 QB 710.

irrespective of her status as a married or an unmarried female person. Wife-rape is as much an offence as the rape of an unmarried woman. Until recently, in some jurisdictions the husband who had forcible intercourse with his wife could not be prosecuted for rape on the suspect theory that the commitment “Yes, I do” made by her at the time of marriage included consent to intercourse at all times with her husband. It is submitted that section 296 gives the husband no such privilege and does not permit of any such interpretation. The section certainly catches the wife-rapist as well. His invocation of the family law concept of right to consortium will not save him from a conviction. A spouse may, in virtue of that right demand intercourse from the other as an incidence of marriage. But it is settled law that that right must be exercised reasonably.

In England the phrase ‘unlawful sexual intercourse’ in the definition of the old law of rape was interpreted to mean that rape was not capable of being committed by a husband against his wife. A married woman either consented to intercourse with her husband or was deemed, merely by reason of the marriage, to consent. In the bizarre case of *DPP v. Morgan*⁸⁷⁴, Morgan and his three companions were members of the Royal Air Force. Following a drinking session Morgan took the three men home to have sexual intercourse with his wife. He told them she might resist because she was a bit ‘kinky’ and this was the only way she could get ‘turned on’. When they got to Morgan’s house Mrs Morgan was in bed asleep. She did not habitually sleep with her husband. She was frog-marched to another bedroom and laid on a double bed. Each of her arms was held and her legs were held apart. All three men then had intercourse with her. When they had finished and left the room Morgan had intercourse with her himself. Mrs Morgan immediately left the house and went to a nearby hospital. She said she had done all she could to resist.

The three men were charged with rape and they, together with Morgan, were charged with aiding and abetting the rape. Morgan was not charged with the main offence of rape because as a husband, he could not, as the law stood at that time, be guilty of rape upon his wife. It was held by the House of Lords that the three men had intercourse with the woman without her consent or with reckless indifference as to whether she consented or not. The test of recklessness, said the Court, was subjective not objective because if the defendant believes the woman is consenting that belief need not be based on reasonable grounds. The Court therefore concluded that the conviction of the three men for rape and of all four of them for aiding and abetting must stand.

In 1991 the old rule that rape was not capable of being committed by a husband upon his wife was eliminated from English law by the decision of the House of Lords in *R. v. R*⁸⁷⁵ to the effect that a husband can rape his wife

⁸⁷⁴ [1975] 2 All ER 347, HL

⁸⁷⁵ [1991] 4 All ER 482.

(personally and not only through the innocent agency of another man as was held in *Cogan*). In that case a husband and wife were having matrimonial problems. The wife left her husband and went to live with her parents. She left a note at the matrimonial home saying she was going to petition for a divorce. Some three weeks later the husband forced his way into the house of his wife's parents who were out at the time and attempted to have sexual intercourse with his wife against her will. In the course of doing so he squeezed her neck and therefore assaulted her. He was tried among other things for attempted rape. His defence was that he could not in law commit rape or attempted rape upon his wife. Her consent was presumed. He was convicted. The trial judge followed an existing rule that rape could take place if the wife had ceased, as in this case, to live with her husband. Nevertheless the husband appealed saying there could be no rape of a wife in the absence of a court order of divorce or separation or a separation agreement.

The House of Lords decided that a husband could rape his wife if he had intercourse with her without her consent even if they are not divorced or separated but were cohabiting. It was unacceptable, the House reasoned, that by marriage a wife submits to sexual intercourse in all circumstances. The marital rape exemption rule was "no longer appropriate in the modern law" because under contemporary conditions husband and wife should be recognized as equal partners in marriage. The law defines rape as having 'unlawful' intercourse with a woman without her consent but the word 'unlawful' is to be treated as mere surplusage and no longer meaning 'outside marriage' since it is clearly unlawful to have sexual intercourse with any woman without her consent.⁸⁷⁶

Quite apart from the decision in *R. v. R.* it has always been possible in England as in other jurisdictions and still is for a husband to be a secondary party to the rape of his wife by another if he encourages or assists that other to have intercourse with her without her consent and this is so even though the man who actually rapes her is acquitted because he believes the wife is consenting. A husband has always been liable to be convicted in law of the crime of buggery on his wife with or without her consent. The law, which allows buggery between consenting adults in private, applies only to buggery between men.

It is no answer to an indictment for rape that the victim is the defendant's fiancée, ex-wife, concubine, or girlfriend or that the victim is a widow or a simple countrywoman; nor does the age of the victim matter. To carnally know

⁸⁷⁶ The English new Sexual Offence Act, 2003, s. 1, is couched in these terms: "A person 'A', commits an offence if – (a) he intentionally penetrates the vagina, anus or mouth of another person 'B' with his penis, (b) 'B' does not consent to the penetration, and (c) 'A' does not reasonably believe that 'B' consented." The section covers male rape of a female or another male, but not female rape of a male or another female.

an old woman by force is no less rape than the defloration of a maiden of bashful 15. Nor is the question of virtue or chastity relevant to rape. It is not a credible defence to a charge of rape to aver that the victim is a common prostitute or a confirmed nymphomaniac, though this averment may raise a doubt in the court's mind as to whether the woman was actually compelled to submit to intercourse; and this may well be the case if the woman put up a mere token resistance.

The term 'any female' is qualified by the phrase 'whether above or below the age of puberty'. The qualification is unnecessary and doubly silly. First, the phrase is otiose and serves no purpose even as a piece of emphasis. Secondly, puberty is a vague concept. There is no legally or biologically fixed age for puberty as some persons become pubertal much earlier than others. Pubertal period is variable and is thus not the same for all individuals. It is submitted that section 296 applies only to the rape of females above twenty-one years of age. If the female is under sixteen years of age, the charge should be laid under section 346(4), and if she is above sixteen but below twenty-one years of age, the appropriate rape section of the Code that has been violated is section 347. The offence of rape may thus be charged, depending on the age of the victim, under either of three sections: section 296, where the victim is above 21 years of age; section 347(1), where the victim is below 21 but above 16 years of age; section 346(4), where the victim is under 16 years of age.

If a man has forcible connection with a person who has become a 'female' following a sex-change operation will that be rape? There is no decided case on this point. But if the decision in the English case of *Corbett*⁸⁷⁷ is anything to go by, it does not seem that rape would thereby have been committed. The court in that case held that the sex of a person is determined at birth and that this is not affected by any 'sex-change' operation the person may have had. The apparent female in our hypothetical case would, in contemplation of law, still be considered a male. Therefore the proper indictment should, depending on the facts, be indecency or homosexual (i.e. anal) rape and not vaginal rape. Indeed, since for legal purposes, a man who has undergone a sex change operation so as to give him female attributes remains male by sex and, despite the creation of an artificial vagina, does not possess a vagina for legal purposes, it would appear that he can only be raped anally.

The victim of rape must be a live female human being. The question of rape in respect of female animals does not arise for the simple reason that animals lack capacity and cannot in law give consent. The law of rape cannot therefore properly be used to prosecute acts of bestiality that by nature and definition are indecent acts and could, if public, be prosecuted under section 263. Nor can it be used to prosecute the necrophiliac whose act of carnally knowing a dead woman is equally an indecent act, which may be punished as

⁸⁷⁷ *Corbett v. Corbett (otherwise Ashley)* [1970] 2 All ER 33.

violation of corpse (section 274(1)). However, a man is guilty of attempted rape if he has carnal knowledge of a dead woman believing that she is alive, where it is clear that the man knew that the woman would not have consented to intercourse had she been alive.

Sexual intercourse. This phrase is more in use than, but has the same meaning as, carnal knowledge. Carnal knowledge means the penetration of the vagina. The term is limited to penile-vaginal contact. In other words the intercourse or carnal act must be *per vaginam*. This excludes from the law of rape acts of forcible homosexual contact and forcible heterosexual contact with any body cavity or orifice other than the vagina, such as the mouth (fellatio or so-called oral sex) or the anus (buggery).

Sexual intercourse consists in the penetration of the female's sexual organ by that of the male. There must be penetration in order to constitute sexual intercourse. But a very slight penetration is sufficient for the purpose of the law of rape. It is therefore unnecessary, on a prosecution for rape, to prove that the hymen was ruptured or that there was emission of seed or that the female became pregnant. Although rape is consummated upon the slightest penetration of the vulva, the act of sexual intercourse that follows is part of the offence itself, so that aid given after penetration makes the aider an accessory to the offence.

The requirement of penetration means that a man who cannot have an erection is incapable of committing rape. If all that the defendant did was that he forcibly touched the victim's vagina with his flaccid penis he cannot be convicted of rape but of indecency.

Compulsion. Rape within the meaning of section 296 is committed only where the sexual intercourse takes place consequent upon compulsion of the victim. On a charge of rape therefore the prosecution must prove that the defendant compelled the victim to have intercourse with him. This means proving that the sexual intercourse was against the will of the victim. The compulsion must however be by any of the two methods specified in the section, namely, by force or by moral ascendancy. Force here signifies physical violence. If a man has carnal knowledge of a woman by force he is guilty of rape. The fact that the man resorted to force is the clearest evidence that the woman did not give consent and that the intercourse was against her will.⁸⁷⁸ Common examples come to mind. A man seizes a woman, tears her clothes, pulls her underwear off, forces her legs apart and forcibly penetrates her. A man pins down a woman while another has intercourse with her. A man gags a woman and then proceeds to know her carnally.

Where the indictment alleges that force was used to compel the woman to

⁸⁷⁸ This conclusion may be negative if the parties are practising sadomasochists.

submit to intercourse, it must be proved that she resisted. In *Sylvester Angu v. The People* (1970)⁸⁷⁹ the appellant found a girl alone in the kitchen doing some chores for a neighbour who had gone to a hammer mill to grind corn. It was in the afternoon. Appellant had sexual intercourse with the girl there in the kitchen. She was above 13 years of age. The appellant admitted having had intercourse with the girl but claimed it was with her full consent. The High Court at Buea, presided over by Endeley, J held that there was sufficient corroborative evidence of the girl's evidence of rape, found the appellant guilty of the offence and sentenced him to 7 years' imprisonment. On appeal to the West Cameroon Court of Appeal (Cotran, CJ, Dervish and O'Brien Quinn, JJA) it was held, allowing the appeal, that the girl did not actively resist, that she did not cry out during or immediately after the sexual intercourse, that she did not make a complaint at the earliest opportunity, and that the medical report was no corroboration as it did not implicate the accused.

Cotran, CJ delivering the unanimous decision of the Court said,

"Taking the evidence as a whole, there are strong indications that the girl consented to the act and that no force was used by the appellant. The absence of evidence of any active resistance by the complainant, such as marks of violence on her body or on the body of the appellant which one would expect to find had she actively resisted, her failure to make an immediate complaint either to her mother or to a person in the immediate vicinity leave us in grave doubt that the event took place as narrated by her, and we prefer the story told by the appellant as being the true version of the events. In every case of rape it is necessary that the prosecution should prove that the girl did not consent and that the act was committed against her will. We hold that in this case the prosecution failed to do so."

In sexual offences corroboration is always required either as a matter of law or of practice derived from the accumulated experience of courts of law, reflecting accepted general knowledge of the ways of the world. In *DPP v. Hester*⁸⁸⁰, Lord Morris of Borth-y-Guest gave the following explanation why corroboration is always required in sexual offences.

"The reasons for this are diverse. There are some suggestions which can readily be made but which are only with much difficulty rebutted. There may in some cases be motives of self-interest, or of self-exculpation, or of vindictiveness. In some situations the straight line of truth is diverted by the influences of emotion or of hysteria or of alarm or of remorse. Sometimes it may be that owing to immaturity or to lively imaginative gifts there is no true appreciation of the gulf that separates truth from falsehood. It must therefore be sound policy to have

⁸⁷⁹ (1968-1970) UYLR 86.

⁸⁸⁰ [1972] 3 All E.R. 1056, HL.

rules of law or of practice which are designed to avert the peril that findings of guilt may be securely based.”

In sexual offences therefore the alleged corroborative evidence must not only tend to show that the offence was committed but must also implicate the accused in a material particular. It is for this reason that on a charge of rape, mere confirmation of the prosecutrix’s evidence that someone had intercourse with her at the relevant time does not corroborate the case against the accused, for it neither negatives consent nor identifies him as the culprit. In the *Sylvester Angu* case their Lordships were thus quite correct in holding that the torn underpants and the medical report indicating that the girl had been sexually interfered with did not amount to corroboration.

However, their Lordships failed to direct their minds to the question of evidence of opportunity, though whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of the particular case. There was ample evidence that the appellant had the opportunity to commit the offence, for the appellant himself admitted having had sexual intercourse with the girl, his only defence being that the intercourse was consensual. It is trite law that it is not necessary that corroborative evidence be conclusive in itself: it need only tend to confirm that the witness whose evidence requires to be corroborated is telling the truth when the witness says the accused committed the offence.

In the instant case there was common ground between the appellant and the girl that intercourse took place. The question of the identity of the appellant thus did not arise. The only real issue that was before the court to decide on was whether or not the said intercourse was by force. The circumstances⁸⁸¹ and time⁸⁸² of the opportunity for the offence fitted so precisely within the time when according to the medical evidence the offence must have been committed. It is submitted that this evidence of opportunity affords corroboration of the evidence of the girl that the appellant had sexual intercourse with her by force. In any event, in cases of this nature the prosecutor would do well to indict the accused with sexual intercourse indecency under section 346(3) because there consent is no defence to a charge of sexual intercourse with an under-16 girl.

Their Lordships also placed too much weight on what they said was “absence of evidence of any active resistance by the complainant.” There is no requirement in the law of rape that the victim must show that she resisted to the utmost. Resistance includes shouting for help, if she could (which in the instant case she couldn’t because the appellant held her mouth). Evidence of some struggle by the victim is often the best proof that the intercourse was

⁸⁸¹ The girl was alone; and the sexual intercourse took place in the kitchen.

⁸⁸² The sexual intercourse took place in the afternoon.

against her will. In the instant case the victim could not because the appellant held the victim's arms. The resistance must however be more than just token repelling. But the victim is not required to risk death or serious injury or to do an obviously useless act. If non-resistance on the part of the victim proceeds merely from her being over-powered by actual force or from her not being able from want of strength to resist any longer, or from the number of persons attacking her she considered resistance dangerous and absolutely useless, the crime is complete.

It is no excuse that the woman is a common strumpet, that she had consented to intercourse with the defendant on another occasion, that she consented after the fact for it will be making an ass of the law to say the victim validated *ex post facto* the rape committed, that she is the concubine of the accused, or that she conceived but did not terminate the pregnancy suggesting thereby that she gave consent *ex post facto* to the rape; for she is still under the protection of the law, and may not be forced. Although circumstances of this kind do not necessarily prevent the conduct from amounting to rape, they may nevertheless make the court reluctant to believe the denial of the 'victim' that she was not in the given case a willing party. This is so because although there are a large number of genuine rape cases, there are equally many spurious and doubtful rape complaints. Typical cases of spurious complaints are where the woman is a jilted lover; where she made no complaint (to an official or to a parent or family member or to a friend) of the rape at the earliest opportunity; where the woman is embarrassed at having been caught having sex with the defendant and proceeds to lay a complaint against him; where an objection is raised by the woman only after the intercourse while she had all along been a ready and willing party.

Moral ascendancy. This connotes the use of tricks, intimidation, fraud, impersonation, false pretences, threat inducing fear, misrepresentation as to the nature of the act, and taking unconscionable advantage of the victim's mental state of being asleep, unconscious, drugged, hypnotized, drunk or mentally defective. Thus if a man has intercourse with a woman who is in a state of intoxication or insensibility or whose senses are benumbed as a result of drug-taking or hypnosis, knowing her to be in such a state, he is guilty of rape. To have carnal knowledge of a sleeping woman is rape (unless, of course, she has previously, whilst awake, signified her willingness). It is also rape to have sexual intercourse with a woman by personating her husband or by inducing fear in her or by violence or threats.

Submission to sexual intercourse without betraying a disposition to resistance is not necessarily tantamount to willingness by the victim. She may be too young or mentally deficient to appreciate the nature of the act done or to do no more than submit without actually being willing. It is indecency to

have sexual intercourse with a girl below the age of sixteen, whether or not she consents (section 346(3)) and if a man compels an under-16 girl to have sexual intercourse with him, rape is committed (section 346(1)). Having intercourse with any mentally deficient person (idiot, imbecile, moron, lunatic) is rape because the willingness or unwillingness of such a person is meaningless in law.

If a woman's willingness to intercourse proceeds from fraud or misrepresentation relating to the nature of the act (e.g., a willingness to an act of intercourse with a quack doctor on the faith of his statement that he was performing a surgical operation, or by a singing-teacher under pretence to improve the victim's breathing, or by a fake or genuine 'man of God' under pretence to heal her or to augment her spirituality) or to some other fundamental matter, the willingness is deemed by the law to be invalid. In *R. v. Williams*⁸⁸³, Williams, a singing teacher, had sexual intercourse with a pupil aged 16 by pretending that it was a method of making an air passage and improving her voice. The girl believed him and offered no resistance, not appreciating that he was having sexual intercourse with her. He was convicted of rape and his appeal against conviction was dismissed. In *R. v. Case*⁸⁸⁴, a medical practitioner had sexual intercourse with a girl of 14 years of age upon the pretence that he was treating her medically and the girl made no resistance owing to a *bona fide* belief that she was being medically treated. Case was convicted of rape. In *R. v. Camplin*⁸⁸⁵, the Court of Appeal upheld the conviction of a man who had sexual intercourse with a woman whom he had rendered insensible by giving her liquor with intent to excite her sexual passions.

In the *Camplin* type of case, the giving of the liquor must however have been fraudulently done, for it is not enough simply to show that the man encouraged the woman to drink alcohol.

If a man obtains a woman's consent to sexual intercourse without the use of force, threats or fraud he is not guilty of rape, though he may have resorted to various devices to procure the collapse of her resistance such as soft lights, sweet music, flattery and drink. If a man has sexual intercourse with a woman after falsely promising to marry her there is no rape because the woman was not mistaken as to the act and also because she fully consented, no force or moral ascendancy having been used. But if she is a child under the age of 16 he can be convicted of indecency with the child under section 346(3)⁸⁸⁶. It is however rape for an officer investigating a crime to have sexual intercourse with a woman by lying to her that her father was implicated in the crime and

⁸⁸³ [1923] 1 KB 340.

⁸⁸⁴ (1850) 1 Den 580.

⁸⁸⁵ (1845) 1 Den 89.

⁸⁸⁶ *Ministère Public & W. Benoit c. B. Joseph* (1975) 8 Revue Camerounaise de Droit 146.

threatening that he would have him prosecuted if she did not have sexual intercourse with him. The officer's conditional threat amounts to moral ascendancy.⁸⁸⁷

Fraud, which thus vitiates consent or nullifies willingness to the act may relate to the identity of the man (as where the woman is led to believe that the man is her husband or boyfriend) or to the nature of the act to which she 'is willing' (as where she is persuaded that the act is not sexual intercourse but some medical procedure). Consent in such cases does not exist at all because the act consented to, is not the act that was done.

Misrepresentation of any other circumstance (such as the man's wealth, his age or his ability to pay for the woman's services) or the suppression of the truth does not nullify willingness on her part. In particular, if the 'victim' understood the nature of the act to be done, it is immaterial that the accused deceived her about his state of health⁸⁸⁸ or about his status as a bachelor or about the results which will follow on such intercourse (e.g., a representation by a traditional doctor to the 'victim' that intercourse with her would cure her of her infertility problem).

It would seem therefore to be the law that provided the victim knows of the nature of the act and consented to it her mistake as to some collateral detail of the act is immaterial. In the Canadian case of *Bolduc & Bird*⁸⁸⁹, it was held that there was no assault by **D**, a doctor, when he got a woman patient to allow his friend to watch a vaginal examination of her by falsely telling her that the friend was a medical student. The woman knew the nature of the act. She consented to it, even though had she known the true situation about the friend she would not have consented.

Defences. It is a credible defence that no force or moral ascendancy was used. For example, he may merely have flattered her, promised to buy her a gift, promised to render some service to her, told her a lie or other cock-and-bull story about marrying her, or made a false promise to take her on holidays. It is also a credible defence that the accused believed on reasonable grounds that the woman was a willing party. Reasonable grounds for this belief may arise where the woman betrayed no disposition to resist his sexual advances or where she led the accused on or where she took part in 'heavy petting' before the intercourse.

Another credible but controversial defence is that the parties have since married. By section 297, a subsequent marriage between a rapist and his victim

⁸⁸⁷ *Ministère Public & Makam Cécile c. Ndombol Jean-Baptiste* (1976), C.A. Bafoussam, Arret No. 319 du 23 février 1976, unreported.

⁸⁸⁸ But it would, on policy grounds, be different if he lied about his HIV status, e.g. that he is HIV negative whereas he is positive or that he has no STD whereas he has.

⁸⁸⁹ (1967) 61 DLR (2nd) 494.

is a bar to the commencement or continuation of any prosecution, and, where a conviction has already been entered, the marriage expunges the conviction and puts an end to the enforcement of all penalties (sections 297, 73). There must however be a proper marriage, whether customary or statutory, freely entered into. Further, the victim must be ‘over puberty’, though in respect of rape under s. 296 this requirement is redundant since that section, it is submitted, applies only to adults. A mere promise of marriage, or a mere engagement, or a mere payment of dowry will not do.

Several rape offences. Punishment. Rape in whatever form is regarded in many countries as heinous, perhaps next only to murder. Indeed, from ancient times rape has always been punished most severely: death, life imprisonment, castration, gouging of the eyes, or flogging. In view of this near universal severity of punishment for the crime of rape, the penalty for rape in this country appears comparatively mild.

The Code punishes five distinct rape offences, each with a different penalty depending on the age of the rape victim, the position of the rapist, and any help given to the rapist in committing the offence. First, there is what may be called ‘*rape of an adult*’, that is, the rape of a female person above the age of twenty-one. This category of rape offence is punishable by 5 to 10 years’ imprisonment (section 296). Secondly, there is what may be termed ‘*aggravated rape of an adult*’ female person (section 298). This incurs the enhanced penalty of imprisonment for from 10 to 20 years. The aggravating factors here are: where the offender has authority over or custody (by statute or custom) of the victim, where the offender is a public servant or a minister of religion, or where the offender was helped in the commission of the offence by one or more persons. In the first two factors the aggravation relates to the privileged status and relationship of trust of the offender (a person in *loco parentis*, a person in whom trust is ordinarily reposed) vis-à-vis his victim.

The third category of rape offence is ‘*rape of a minor*’, that is, rape of a female person over sixteen but under twenty-one years of age (section 347(1)). It is punishable by imprisonment for from 10 to 20 years. Additionally, the court may, by way of accessory penalties, divest the offender of parental authority and disqualify him for up to five years from being guardian or curator of any minor.

The fourth type of rape offence is ‘*child rape*’ (s. 346 (4), which carries the further enhanced penalty of imprisonment for from 15 to 25 years. A ‘child’ within the meaning of s. 346 means an under-16.⁸⁹⁰ In *The People v. Pezimo Zacharia* (1979)⁸⁹¹ the appellant cornered an under-13 girl at a farm where she

⁸⁹⁰ In some jurisdictions this offence (including its aggravated form) falls within the category of offences known either as ‘child defilement’ or ‘statutory rape’.

⁸⁹¹ Criminal Appeal No. BCA/52.c/79, unreported.

was harvesting peanuts. He held her hands, threw her over, pressed her to the ground with his foot and sexually assaulted her, the child crying in pain and bleeding all the while. His conviction by the court below was confirmed on appeal. In *Joseph Moma v. The People*⁸⁹², the Bamenda Court of Appeal confirmed the conviction of the appellant for attempted rape. He caught the prosecutrix, knocked her to the ground, slept on her back, tried to turn her face upwards, sent his hand to her private part and tore her pants. Inglis J asked rhetorically, “What more evidence of an irrevocable intention on the part of the appellant to commit this serious offence is required?”

The fifth type of rape offence in the Code is ‘*aggravated child rape*’ (section 346(4) read with section 298). It carries a mandatory life sentence. A person is guilty of aggravated child rape if he rapes an under-16 girl with the assistance of another person. Likewise, the rape of an under-16 girl by her guardian or by a public servant or by a minister of religion also amounts to ‘*aggravated child rape*’.

It is strange that the rape of a girl child by her father, brother or a close relative (that is, incestuous rape) is not considered as aggravated child rape. The Code punishes incest with the comparatively light penalty of imprisonment for from one to three years (section 360). The wisdom of the law’s leniency in this case may be seriously doubted.

Suppose that a person knows himself to be HIV-negative or to be suffering from AIDS or other STD.⁸⁹³ If he then rapes another person (whatever her age) there is no good reason why his poor medical status of which he is fully aware should not be considered an aggravating factor for the offence of rape entailing an enhanced punishment. The rapist in this case must be taken as having violated the person of the victim and as having deliberately intended to infect her. However, if the woman fully consented to the act of sexual intercourse, the mere fact that the man had the disease would not convert the act into rape. A person’s bill of health may be clean, suspected or foul. So if a man knows his bill of health to be suspected or foul and he infects a woman who is not told of the disease he can be convicted of an offence under section 280 or section 281.

Interest protected. Rape is an offence against sexual morality. It is also a crime against the bodily integrity of the female person. It constitutes a profound and disastrous invasion of the female’s physical integrity. The health of a society also depends on the discipline of its members in the sphere of morals. It has been said that the freedom to reject or to accept a man’s advances is the most fundamental a woman can have.

⁸⁹² (1974) BCA/29.c/74, unreported.

⁸⁹³ This issue is fully discussed in chapter 14.

Reform proposal. In 1983 this writer proposed the following new consolidated rape offence denoted as ‘sexual abuse’ (or as ‘sexual aggression’ if it is thought that the previous expression is too weak to adequately convey the degree of revulsion and gravity of the conduct).⁸⁹⁴

“1. Whoever has sexual connection with any person below 18 years of age shall be punished with imprisoned for from 12 to 20 years.

2. Whoever has sexual connection with any person aged 18 years and above by – (a) using force, threats, intimidation, seduction, tricks, impersonation, hypnotism, or by rendering the victim insensible; or (b) taking advantage of the fact that the victim is drunk, mentally weak, unsound of mind, ill, or is his child or ward or relative (up to the third degree), shall be punished with imprisonment for from 5 to 7 years.”

The proposed new offence reinforces the protection of persons who are mentally weak or weak because of tender years. It does not discriminate between male and female persons; a person of either sex is capable of being an offender or a victim. It is wider than the existing offence in that it covers both vaginal and anal rape and cases of rape by instrumentality. For technical reasons, however, it excludes rape through an innocent agent. The proposal eliminates the need, in any discussion of the offence, to have recourse, pedantically, to the notion of constructive force and its intricacies.

It differentiates between persons below and those above 18 years of age because in this country 18 years is both the age of majority and of full criminal responsibility. The proposal in effect prohibits any intercourse with a person who has not yet attained the age of 18 years and this, by necessary implication, also means no one who has not attained the age of 18 years may validly marry.

The penalty of 12 to 20 years imprisonment might at first appear too severe. But it must be remembered that the proposal takes into its sweep cases of what is sometimes referred to as ‘child defilement’. Cases of defilement of babies of three or four years are not unknown. The severity of the proposed penalty is thus fully justified and is in fact in line with the prescribed penalty for rape-indecency under section 346(4) and for similar offences in other jurisdictions. In any event, the proposal does not rob the court of its power, when it comes to sentence, to take into account mitigating or aggravating factors, as may be warranted by the circumstances of each case, in the award of punishment. It is submitted that this modest proposal, which certainly needs some tinkering with so as to fine-tune it, was quite prescient when one recalls that in these days of HIV and AIDS there is a very strong advocacy for the postponement by young people of sex to much later.

⁸⁹⁴ C Anyangwe, ‘The Law of Rape ...’ *op cit*.

§3. Indecency with young people

Three sections of the Penal Code deal specifically with the protection of the sexual integrity of young people. These are sections 344, 346 and 347 which, respectively, deal with ‘corruption of youths’, ‘indecenty to child under sixteen’, and ‘indecenty to minor between sixteen and twenty-one’. These provisions are specific to young people and not cumulative on the law as to rape, public indecenty, and private indecenty. Each of them is a dual offence. In other words, the offence in any of those provisions is capable of being committed by a man or a woman against a female or a male youth. Sections 344 and 346 prohibit sexual intercourse or the commission of immoral or indecent acts with youths below a certain age, *even with their consent*.

Indecency to minor between sixteen and twenty-one years of age.

Section 347(1) provides: “For an offence under sections 295, 296 and 347A ... committed against a person over sixteen and under twenty-one years of age, the penalty shall be doubled.”

This is a mere penalty section, for it does not create any offence at all. It merely ordains that the penalty for private indecenty, rape, or homosexuality is to be doubled where the victim of any of these crimes is a minor, a term which under section 347(1) bears the special meaning of a person over sixteen and under twenty-one years of age.

Ordinarily the penalties for private indecenty, rape, and homosexuality are, respectively, 15 days to 2 years’ imprisonment and/or a fine⁸⁹⁵; 5 to 10 years’ imprisonment; and 6 months to 5 years imprisonment and a fine⁸⁹⁶. But where the victim of any of these offences is a person whose age falls within the 16-21 years age bracket, the penalties are doubled and become, respectively, 30 days to 4 years’ imprisonment and/or fine, 10 to 20 years imprisonment, and 1 to 10 years’ imprisonment and a fine. Additionally, the accessory penalty of forfeiture may be imposed on the offender. Thus, upon conviction under s. 347 the court may deprive the offender of parental authority and disqualify him from being guardian or curator of any minor⁸⁹⁷ for a maximum period of five years (section 347(2)).

It is noteworthy that in the case of rape of a ‘minor’, since the penalty is raised to imprisonment for from 10 to 20 years, the crime becomes a felony and can be tried only on indictment. The proper manner of laying a charge or an indictment under section 347(1) is as follows: indecenty to (or ‘indecenty with’, if the indecent act involved battery) minor aged **X** years (state the age, which must fall between the 16 -21 years bracket) contrary to section 295 (or

⁸⁹⁵ From 10 000 to 100 000 francs.

⁸⁹⁶ From 20 000 to 200 000 francs.

⁸⁹⁷ Here this term must be understood in its ordinary plain meaning of a person below the age of criminal responsibility, that is, a person under eighteen years of age.

to section 296 or to section 347A, as the case may be) and punishable under section 347.

Where it is alleged that an indecent act (section 295) or rape (section 296) has been committed against a minor between 16 and 21 years of age, the question of consent or of willingness is relevant, except where the minor is mentally deficient, in which case the issue of consent or willingness is meaningless. The crime under sections 295 is consummated only when the act is committed in the presence of a non-consenting party; and rape under s. 296 is committed only when the victim was compelled to have the sexual intercourse. It follows that the crime of private indecency against a ‘minor’ is not committed if the indecent act was done in the presence of the ‘minor’ with the minor’s consent. Nor is rape committed if the ‘minor’ willingly had intercourse with the defendant.

Section 347 does not therefore prohibit consensual sexual intercourse with a female who is a ‘minor’. One does not wish to appear to be condoning promiscuity among ‘minors’, but that is as it should be. In this country a girl who is only fifteen years old may lawfully get married⁸⁹⁸ Section 347(1) cannot be construed as disabling a ‘minor’ between 16 and 21 years of age from giving effective consent for the purpose of sexual intercourse as that would produce the absurd result that a man who has consensual sexual intercourse with his lawfully wedded wife whose age falls within the sixteen to twenty-one years age bracket is guilty of rape! However, consent is no defence to an offence under section 347A (homosexuality), so that a person charged with an offence under that section against a minor cannot be heard to say the minor consented to the homosexual act.

‘Corruption of youth’. By section 344, “whoever excites, encourages or facilitates the debauch or corruption of any person under eighteen years of age” is guilty of an offence and punishable by imprisonment and fine.

In terms of the section a ‘youth’ is any person under eighteen years of age. The section punishes the debauch or corruption of an under-18, whether a girl or a boy. The perpetrator of the offence can be a man or a woman. The terms ‘debauch’ and ‘corruption’ clearly indicate, that this offence seeks to protect youths from sexual immorality.

The offence overlaps with cognate crimes such as public indecency, private indecency, indecency to child under 16 years of age, and homosexuality. Any act of sexual arousal giving rise to sexual immorality in the youth falls within the terms of the section.

Examples of such acts are: fondling the youth, touching the erotic parts of the youth’s body, getting the youth to watch sex movies, displaying pornographic material for the youth to see, passionately kissing or caressing

⁸⁹⁸ Section 52 (1), Civil Status Registration Ordinance, 1981.

the youth, exposing one's person to the youth, fiddling with the youth, a man 'fingering' a female youth or getting her to masturbate him or to do oral sex with him, a woman masturbating a male youth or getting him to 'finger' her or to fondle her breast or to have oral sex with her, *procuring* a male youth to have sexual intercourse with a prostitute or a 'sugar mummy', *procuring* a female youth to frequent a brothel or to have sexual intercourse with a 'sugar daddy', showing the youth photographs of nude men and women, taking the youth to watch a strip-tease show. To introduce a boy to a common prostitute or a confirmed 'sugar mummy', or to introduce a girl to a commonly known 'sugar daddy' or philanderer may properly be construed as facilitating the debauchery or corruption of the youth.

Section 344 does not extend to cases of actual sexual intercourse with the youth. Nor does it extend to acts of homosexuality and lesbianism. This is because intercourse with an under-16 is a separate crime and one of strict prohibition under section 346(3). Further, homosexuality is a distinct offence *eo nomine* under section 347A. However, section 344 is intended to and does catch male and female paedophiliacs (i.e., pedophiles or child molesters). It is no answer to a charge under this section that the youth consented to the act, for consent given to an unlawful act is invalid in law.

It is submitted that a single occurrence of exciting, encouraging or facilitating the debauch or corruption of the youth will not do to secure a conviction under section 344. There must be some repetition, twice at least. An act, on an isolated occasion, meant to arouse sexual desire is most unlikely to lead to debauchery or corruption. It is often the repetition of such lewd acts, over a period of time that leads to debauchery or corruption. Where the exciting, encouraging or facilitating was done only on one occasion a conviction is more likely to be secure by prosecuting the defendant under the appropriate section of the Code dealing with indecency.

'Corruption of youth' is punishable by imprisonment for from 1 to 5 years and a fine⁸⁹⁹ where the victim is a youth aged sixteen, seventeen or eighteen years, and by imprisonment for from 2 to 10 years and a fine⁹⁰⁰ where the victim is a youth under the age of sixteen years (section 344(2)). Additionally, upon convicting the defendant the court may order the forfeitures described in section 30 of the Code. The court may also order the deprivation of the offender of parental power for the period of the custodial sentence. The court may further disqualify the offender from being guardian or curator of any minor.

Indecency to child under 16. Section 346(1) provides that any person who commits an indecent act in the presence of a child under the age of sixteen is

⁸⁹⁹ From 20 000 to 1 million francs; Section 344 (1).

⁹⁰⁰ Of from 40.000 to 2 million francs.

guilty of an offence punishable under the same sub-section.

This offence is the same as that of private indecency under section 295 except for the following differences: (i) section 346 is confined to the specific case of children under sixteen years of age; (ii) consent is irrelevant under section 346; and (iii) it is of no consequence whether the offence is committed in public or in private. Subject to this caveat, what was said when discussing section 295 applies, *mutatis mutandis* and with equal force, to section 346.

The attitude of the criminal law, as expressed in section 346, is that children under sixteen years of age need protection even against themselves. This is correct. The carnal abuse of children having excited the attention of the lawmaker, they are specially protected by section 346. The section protects youngsters by disabling them from giving an effective consent. Consent cannot be pleaded if an indecent act is committed 'in the presence of'⁹⁰¹, against or on⁹⁰², or with⁹⁰³ an under-16.

Even if the child purportedly consented or did not realize the significance of what was being done in his/her presence or did not suffer any harm, the law considers the 'consent' as invalid and of no effect. The law takes this father-figure attitude for at least two reasons: the immaturity and inexperience of the under-16, and the alarm and annoyance caused to parents or guardians (including, presumably, the protection of the interest of parents in having a chaste/virgin daughter/son).

Since the object of section 346 is to save children under the age of sixteen from their own mental and physical immaturity, it follows as a matter of inexorable logic that there is room under this section for the protection of persons who are mentally defective. If then the consent of an under-16 is invalid for the purpose of the law of sexual indecency, *a fortiori* the 'consent' of an idiot (i.e., a person with the mental age of a child of less than three years of age), an imbecile (i.e., a person with the mental age of a child between the ages of three and seven years), a moron (i.e., a person with the mental age of a child between the ages of eight and twelve years) or a lunatic. The court relies on expert evidence from psychologists and psychiatrists in deciding the question of mental deficiency.

Under section 346, indecency in whatever form or shape, to a child under the age of sixteen is an offence even if the under-16 gave 'consent'. If the under-16 consented the accused is guilty of an offence; if the under-16 did not consent, *a fortiori*, he is guilty. Take sexual intercourse, for example. In the law of sexual indecency sexual intercourse is a species of indecency *with* another.

Section 346(3) punishes with imprisonment for from 10 to 15 years anyone who "has sexual intercourse with [a child under the age of 16], notwithstanding

⁹⁰¹ Section 346(1).

⁹⁰² Section 346(2)(4), such as rape, assault.

⁹⁰³ Section 346(3), such as consensual intercourse.

his or her consent.” It is submitted that the words ‘notwithstanding his or her consent’ were inserted in the provision merely *ex abundanti cautela* (from excess of caution).

In *The People v. Dominic Mathew Akpan*⁹⁰⁴ the accused was charged on two counts under section 346(3) of the Penal Code with having sexual intercourse with two girls, each of who was about 7 years old. The two girls, Lucy and Mary, gave evidence of how on the day in question they were bathing in a nearby bathing pool when the defendant invited them to his house. When they got there he took them into his bedroom and locked all the doors. He then ordered Lucy to remove her underpants. Lucy did so and the defendant too undressed. He then laid the girl on the bed and forcibly had carnal knowledge of her. As Lucy was crying out with pain he shut her mouth with his hand. All this happened in the presence and hearing of the other girl, Mary. When the defendant finished with Lucy, he called on Mary and repeated the act on her. After the acts, he dismissed the girls warning them that if they related the incident to anyone, he would cut them with a cutlass or spear them.

Mary’s mother discovered some watery exudation from Mary’s genital organs. When baths with disinfectants could not stop them she took her to the hospital where after examination the doctor declared that Mary had been sexually assaulted. When the mother returned home, she related the whole matter to her husband. He questioned Mary about the matter and after smacking her she told the story of the experience she and Lucy had had in the defendant’s bedroom. The matter was then reported to the police. In the course of their investigations the police took the two girls and the defendant for medical examination. Examination of Lucy showed that her hymen was intact but her vulva was inflamed. Examination of Mary revealed that she was suffering from a venereal disease, gonorrhoea, and that even though her hymen was intact there was inflammation and congestion of her vulva. Examination of the defendant also showed that he too was acutely infected with gonorrhoea. These medical examinations were carried out several days after the sexual assault on the girls.

The defendant’s case was a complete denial of the offences. It was argued on his behalf that because no gonococcal infection was discovered on the examination of Lucy, the defendant must only have attempted the act on her and could therefore not be found guilty of an offence under section 346 (3) and that if guilty at all he could only be found so under section 346(1).

Evidence adduced in court showed that at all times material to the charge the defendant was a houseboy of the father of Mary and was as such living within his premises. Endeley J. held that the defendant therefore had the opportunity to have committed the offence alleged. “I find as a fact that defendant did have sexual intercourse with each of the girls in circumstances

⁹⁰⁴ (1968) W.C.L.R 33.

such as were described in their evidence. ... Because I accept the evidence of the two girls, I find that there was penetration in each of the cases covered by the charge. Even if there was no real penetration in the case of Lucy this must have been because defendant found it difficult to do so. He was set for the performance and completion of the act and is by virtue of section 94(2) of the Penal Code, punishable for the offence charged.” Defendant was accordingly convicted on both counts and sentenced to 10 years’ imprisonment on each count, both to run concurrently.

The effect of section 346(3) is that it is absolutely forbidden to have sexual intercourse with an under-16. Any violation of this prohibition is punishable by imprisonment for from 10 to 15 years. The section 346(3)-prohibition in effect makes it rape for a man to have carnal knowledge of an under-16 girl⁹⁰⁵ or for a man to have anal connection with an under-16 boy or girl. A similar prohibition in other jurisdictions, for example in the United States, is known as statutory rape. In *Garnett v. State*⁹⁰⁶, the Supreme Court of Maryland observed that:

“statutory rape laws are often justified on the ‘lesser legal wrong’ theory or the ‘moral wrong’ theory; by such reasoning, the defendant acting without *mens rea* nonetheless deserves punishment for having committed a lesser crime, fornication, or for having violated moral teachings that prohibit sex outside of marriage. ... This interpretation is consistent with the traditional view of statutory rape as a strict liability crime designed to protect young persons from the dangers of exploitation by adults, loss of chastity, physical injury, and, in the case of girls, unwanted pregnancy.”

In the crime of statutory rape neither the girl’s consent nor the man’s genuine belief that the girl is above the age of 16 are of any moment because the offence is formulated as a crime of strict liability. The statutory rapist is fictionally put on the same footing as the actual rapist. According to one commentator, the law on statutory rape is communicating the following message: “If you choose to have intercourse with a willing female who may be over or under the age of consent, you will be playing a game with the law as well as with her. If she is under age, you lose the game and will be condemned as a felon, regardless of what she may have told you and regardless of the reasons you may have had for believing her.”⁹⁰⁷

In *The People v. Solomon Mbang*⁹⁰⁸ the accused, who the Court found to be an under-18 boy, admitted having sexual intercourse with the prosecutrix whose

⁹⁰⁵ That being the case s. 346 (4) would seem redundant to the extent that it goes on to talk of ‘in case of rape’.

⁹⁰⁶ (1993) 332 Md 571, 632 A.2d 797.

⁹⁰⁷ HM Hart, ‘The Aims of the Criminal Law,’ 23 *Law and Contemporary Problems* 1959, p. 430.

⁹⁰⁸ (1968) W.C.L.R. 56.

age the Court estimated to be below 13 years. The defence of the accused was that the girl had in fact requested him to have sexual intercourse with her, that he had had previous consensual intercourse with her on five occasions and that the girl told him she was 15 years old and he believed her. Dervish J. held, convicting the accused, that consent was no defence to a charge under section 346 (3) and that the accused was not misled as the girl's age. However, given the fact that the accused was an under-18 the learned Judge held that he was a person of diminished responsibility and, further, that since the prosecutrix was a willing party to the sexual encounter that fact though not a defence nevertheless entitles the accused to a consideration of mitigating of his sentence. The accused was accordingly sentenced to 2 years' imprisonment.

In the offence under section 346(3), consent is specifically excluded by the provision. However, the *mens rea* requirement for the commission of the offence is not excluded, so that the accused is liable only if he knew or had reason to know or believe the victim was under the age of 16. In *B (a minor) v. DPP*⁹⁰⁹, a 15-year-old boy was charged with inciting a girl below 14 years of age to engage in an act of gross indecency (sexual intercourse) with him. The House of Lords held that the offence was not one of strict liability, albeit that the relevant section does not mention *mens rea*. In the Court's opinion, *mens rea* is a constituent element of an offence, unless Parliament has expressly or by necessary implication indicated otherwise.

The age requirement is a critical requirement of the offence and must be conclusively proved by the prosecution. Such proof is nowadays easy to provide since there is in place in the country since the 1960s a state comprehensive system of registration of births (as there is that of registration of marriages and deaths). A genuine birth certificate will suffice for this purpose. But in the absence of such a certificate the victim's age can be proved by expert evidence.

In *The People v. Evaristus Ndong* (1973)⁹¹⁰ the accused got 15 years' imprisonment with hard labour for having repeatedly had sexual intercourse with the prosecutrix, a girl whose age was determined to be 11 years. The mother of the prosecutrix travelled out for ten days leaving her alone at her single room, at the CDC Missellele Camp, to look after herself and a couple of smaller children. The next-door neighbour to the mother of the prosecutrix also travelled out leaving the care of his room to the accused. Aware that the prosecutrix was alone the accused successfully lured her into having sexual intercourse with him at night on no less than four occasions at an unused kitchen at the back of the house. Thus satisfied, the accused made away warning the prosecutrix not to disclose the act to anyone under pain of beating if she did.

The result of this forcible sexual intercourse was the inevitable rupture of

⁹⁰⁹ [2002] 2 AC 428.

⁹¹⁰ (1971-73) UYLR 145.

the vagina of the prosecutrix which, because of her stupid, though innocent attempt at concealing it, developed into a chronic *curaculæ mystiformes*, inflammation of the vulva with watery discharge from the vagina as discovered by the medical doctor who examined the child. The report of the medical examination also stated, that “multiple [acts of] sexual intercourse had taken place.” The matter was reported to the law enforcers at Tiko who conducted criminal investigations and upon advice and instructions from the Prosecutor General’s Office, charged the accused to court under section 346 (3) of the Penal Code.

The defence of the accused consisted of a barefaced denial of every allegation against him as being false, attributing the said allegations to nothing at all for its alleged falsity. He admitted knowledge of the girl, but denied any familiarity with her. He admitted being left in charge of the room next to that occupied by the mother of the prosecutrix, but said each time he went there he never stayed till nightfall. He admitted knowledge of the absence from home of the mother of the prosecutrix but said he thought the girl was not alone. The defence case ended with the unsworn and uncorroborated evidence of one witness, a little boy of about 7 years old. The boy stated that he was at first suspected of having slept with the prosecutrix, but that he protested. His innocence was vindicated when the prosecutrix pointed to and named the accused as being the person who had slept with her.

After examining the evidence and the applicable law, Niger-Thomas, J agreed with the prosecution that the offence was one of what he termed ‘strict liability’, admitting of no excuses of any kind. From his findings, the learned trial Judge was “indubitably led to the belief and [he] verily believe[d] that the accused did commit the offence reported of him.” In convicting the accused and sentencing him to 15 years in hard labour, the learned Judge observed, “It is the duty of the court ... to deal most drastically with all apprehended sexual offenders who are tried in a competent court of law and convicted.”

The same Judge also had no sympathy for a ‘native doctor’ when he gave him 15 years in hard labour as well for repeatedly raping a 10 years’ old girl under the pretence that he was curing her of her fainting fits. This occurred in the case of *The People v. Mbedi Njangi* (1973)⁹¹¹. The prosecutrix and her mother travelled from Douala to Tiko in search of a native doctor by name Mbedi Njangi whom they learnt was able to cure fits or fainting disease from which the prosecutrix was said to be suffering at the time. At Tiko they contacted one Chief Dipoko who took them to the said Mbedi Njangi, the accused. The accused readily received the prosecutrix as his in-patient and her mother as his guest, also to act as nurse to her daughter after having duly acknowledged their recognition of him as a specialist in the treatment and cure of the disease complained of. The mother of the prosecutrix soon observed that it was the

⁹¹¹ (1971-73) UYLR 152.

practice of the accused to be taking the prosecutrix out with him to the bush every morning but she did nothing about it because she felt it was in the course of the girl's treatment. Then came the first report from the prosecutrix to her mother of her experience in the bush with the accused in which she alleged that the accused, under the pretext that he was giving her treatment forcibly had sexual intercourse with her. She dismissed this report as childish, still feeling that it was the course of treatment the child was undergoing.

Several days later she discovered that the prosecutrix was unable to walk normally but with great efforts. She then recalled what the prosecutrix had told her and subjected the child to her own personal examination. The examination disclosed bruises and swelling of the child's vagina as resulting from the alleged treatment being given her by the accused. Upon this shocking discovery she stopped the child from going to the bush anymore with the accused who did not question the reason for the stoppage. In the interest of the safety of her daughter and herself she did not question the accused about the painful discovery she had just made. She however reported the matter to Chief Dipoko who advised her to report it to the child's father in Douala, which she did. The father, mother and child subsequently came down from Douala to Tiko, contacted Chief Dipoko and the child was taken to a clinic for medical examination and report. The report certified defilement 'within the past two months'. The matter was reported to the Police. The accused was arrested and indicted for indecency with an under-16 girl contrary to section 346(3).

The accused's defence was a denial of all allegations of sexual intercourse, saying the allegation against him arose out of disappointment by the child's mother by reason of a very severe attack of fits that seized the child on a particular day, as a result of which they went out and consulted a medical doctor. Mr. Justice Niger-Thomas, the learned trial Judge, found himself unable to agree with the points raised by counsel for the defence and, on the preponderance of the evidence adduced, both direct and circumstantial, in favour of the prosecution, found the accused guilty of the offence charged and sentenced him to 15 years' imprisonment with hard labour.

The learned Judge made the following important observation: "In passing sentence the court has to bear in mind the rather disgusting conduct of the accused even as an elderly looking man of family and an apparently first offender. The penalty of 10 to 15 years' imprisonment, in my view, will never heal the damage done by this kind of acts committed by ruthless offenders unless applied ruthlessly, not so much for injury done to the victim as for that done to the community in general and to all doctors in the country, be they native or traditional or foreign. The accused will therefore be sentenced to 15 years I.H.L. and in addition, he will, for 5 years, thereafter, be deprived of all parental care and disqualified to act as guardian or curator to minors."

This was clearly a case in which a much more severe sentence was

warranted had the section under which the indictment was laid provided for a higher penalty. The offender defiled on several occasions a child patient of 10 years of age. He did so under the false pretence of curing her illness. He took unconscionable advantage of the fact that the child was a patient. He abused not only her immaturity of age but also her medical condition. He betrayed the trust in him as a traditional doctor. He brought shame and disrepute to his profession. The indictment should have been laid under section 346(4) where the prescribed penalty is much higher. There is little doubt that the conduct of the offender amounted to rape: he had sexual intercourse with the girl under the pretext that it was cure for her illness, and the girl made a report to her mother the very first time the incident occurred. The sexual intercourse was thus by moral ascendancy, to say the least. Further, the little girl having been received for treatment by the offender as his in-patient, he doubtlessly had authority and custody over her.

What is the meaning of 'in case of rape' envisaged in section 346(4), and for which a further enhanced penalty of 15 to 25 years, or even life, imprisonment is provided? In the absence of any different meaning assigned to the term 'rape' under section 346(4), the term must, for interpretative consistency in the Code, be taken to have the same technical and restrictive meaning as given in section 296. Under section 296 rape is a male-only offence (except for the very peculiar case of rape based on the doctrine of innocent agency) whereas an offence under section 346(1)-(3) is a dual offence. Since consent is no defence to an allegation of sexual intercourse under section 346(3), it follows that a woman who has intercourse (forcible or consensual) with an under-16 boy is technically guilty of rape. And yet section 296 informs us that a rapist can only be a man. To resolve this inconsistency the draftsman of the Code goes on in section 346(4) to provide specifically for what is term 'in case of rape'. In doing so he is suggesting, oddly and unrealistically, it is submitted, that rape (including even girl-rape) cannot be committed under section 346(3).

In practice, however, and as a matter of justice and social policy, if a man carnally knows a girl aged 14 or 15 years with her 'consent', or a woman a boy aged 14 or 15 years with his consent, an indictment ought to be preferred under section 346(3). That provision specifically refers to sexual intercourse. Sexual intercourse with an under-aged person is indecency *with*, and not indecency *to* or *in the presence of*, the under-aged person. This is especially so if the accused is a youth under the age of twenty-one or if the 14- or 15-year-old is already sexually mature or appears to be much older or seeks the attention of persons of the opposite sex or if she/he enticed the accused into the relation, for in such cases the other party may be more sinned against than sinning.

This suggested moderation in prosecuting cases such as these is also dictated by the following considerations. Where the parties have sexual

intercourse in disregard of the law's injunction and it appears from the available evidence that intercourse was consensual (albeit that intercourse with an underage person is legally invalid), both parties are *in pari delicto* and the conduct though unlawful is nevertheless victimless and deserves lenient consideration.

However, where a person has forcible sexual intercourse with an under-16 moderation in prosecution and punishment must make way for rigorous enforcement of the law. The accused must be made to face the full brunt of the law. An indictment should therefore be laid under section 346(4), and not under section 346(3) as was done leniently in *The People v. Okeke Okafor John*⁹¹².

In that case, the accused defiled Felicita, an under-4- year-old girl. The indictment was rape under section 296. Medical evidence showed that there was blood on the child's vulva and that her labia minora were congested. Given the very revolting circumstances of the case and the fact that the victim was in fact just a baby, the High Court at Kumba invoked its powers under section 163 of the Criminal Procedure Ordinance to alter a charge *suo motu* (on its own initiative). It amended the charge to one of rape-indecency under section 346(3), convicted the accused on it and sentenced him to 15 years' imprisonment. In an important statement of the law, Endeley J. stated:

"[M]indful of the rule against giving absurd interpretation to statutes, I hold that from the moment a sexual assailant undresses himself or his victim or sets out so to do, he has committed or set out to commit an indecent act in the victim's presence. The governing factor here is the intention behind the main act of indecency and his intention can best be inferred from the proven facts after considering the evidence as a whole. ... [B]ecause I find that the defendant sexually assaulted the child I find also that he committed an indecent act on her and in her presence. ... Penetration, however slight, is in law sufficient to justify a conviction for rape. ... [T]he facts, even if insufficient to justify a positive finding that there was sexual intercourse, are sufficient to show that there was an attempt to commit sexual intercourse."

Section 346 as originally drafted was amended in 1972, increasing from 13 to 16 years the cut-off age for the crime of indecency with child. Where the indecency with an under-16 girl or boy involves sexual connection the crime is what could be denoted as 'indecency-rape', punishable either under subsection (3) or subsection (4) of section 346. Where the victim purportedly consented to the act (the consent of an under-16 person is invalid in the law of indecency and therefore is only apparent consent) the indictment should be laid under subsection (3), especially also, it is submitted, if the child is pubertal or appears to be already sexually active. But where the sexual act was forcible and especially where the victim is an infant below the age of puberty, it is

⁹¹² (1968) W.C.L.R. 60.

submitted that the indictment should be laid under subsection (4) which provides for a much more severe penalty.

In *The People v. Sakwe Stephen* (1987)⁹¹³, the accused got 10 years for rape of an under-16 girl after successfully pleading his status as an orphan. In *The People v. Dominic Onuoba* (1975)⁹¹⁴, the accused was convicted of the carnal knowledge of an under-16 girl. Njamnsi J gave him a mere 10 years after he successfully pleaded in mitigation the fact that he was a 52-year-old married man with eight children. One would have thought that for an offence of this nature the factors pleaded by the accused should have weighed in as aggravating rather than as mitigating circumstances; at least the court should have refused to take them into account as mitigating factors. In *The People v. Bigingsi Amuhngwa Vincent* (1985)⁹¹⁵, Asu J convicted the accused of unlawful sexual intercourse with an under-16 girl. However, the convicted person successfully pleaded the fact that he was a first offender and got away with a light sentence of 5 years' imprisonment in hard labour.

An all cases of rape-indecency upon a child under the age of 16 (section 346(4)), should evidence of force or of moral ascendancy not be forthcoming, the accused can be convicted under section 346(3) since unlawful intercourse with an under-16 is a lesser-included offence on a charge of rape under section 346(4).

In view of the definition of rape under section 296, only a male may, generally speaking, commit rape and thus, on principle, only a male may be prosecuted under subsection (4) of section 346. This means that a woman who forcibly has carnal knowledge of an under-16 boy is guilty not of rape but of unlawful sexual intercourse, just as the woman who has 'consensual' intercourse with an under-16 boy.

Oddly, and in total disregard of the canon of gender equality, the lawmaker treats the self-same conduct by males differently and visits it with a higher and far disproportionate penalty. While female rapists might be rare, it seems improper from the point of view of criminal law policy to punish the same conduct differently on the basis of gender. Moreover, female paedophiliacs are also probably rare. But the criminal law treats the male and the female paedophile in the same way.

The formulation of section 346 produces another rather unusual result. Subsection (3) of that section prohibits even consensual sexual intercourse with an under-16 girl. But by section 52(1) of the Civil Status Registration Ordinance, 1981, a man may lawfully marry a fifteen years' old girl. Bizarrely, if then he has consensual intercourse with his fifteen-year old wife he commits an offence under section 346(3) and may be sent to prison for as long as

⁹¹³ Suit No. HCF/9.c/87, unreported.

⁹¹⁴ Suit No. HCSW/29.c/75, unreported.

⁹¹⁵ Suit No. HCSW/38.c/85, unreported.

fifteen years. The family law lawyer would probably submit that a prosecution would legally be impossible because marriage by the fifteen years' old girl has the effect of emancipating her from her minority status and investing her with full capacity like an adult, and being an adult in contemplation of law she is capable of giving valid consent to sexual intercourse; so that in the instant case of a 15-year old teenage wife having consensual sex with her husband it is not possible to prosecute the husband for the offence of having sex with an under-16 girl.

It is the case in family law that when a minor lawfully marries his/her incapacity as a minor ceases, for the marriage has the legal effect of emancipating the minor from his/her status of a minor. However, what is good for the civil law is not necessarily good for the criminal law. Criminal law is an autonomous discipline. It is not bound to follow any legal notion, concept or institution that obtains in any other law discipline, except if it has expressly adopted the same. The Penal Code pre-dates the Civil Status Registration Ordinance. Consistency and clarity in the law on this matter would have been achieved by simply putting sixteen years as the mandatory minimum age of marriage.

Defence. Under section 346(1)(2)(3) no defence is allowed that the under-16 instigated the act, or that she is sexually experienced, or that she is a prostitute. These matters may, in a fit case, go to mitigation of sentence. Nor is it a defence under the section that the parents of the under-16 gave consent to the act, or that the under-16 deliberately deceived the other party as to his/her true age, or even that the parties have since married.

But it is an open point whether the accused can plead mistaken belief about the age of the child. This may be particularly important with regard to the age of females. It is a common fact that men do mistake the age of girls and women. Some older females appear much younger while some teenage girls appear much older, especially if a teenage girl wears make-up and a style of dressing generally associated with older women. Moreover, a girl may be of such precocity or of such borderline age (anywhere between fifteen and sixteen years) that a man can easily mistake her age. It is therefore submitted that reasonable mistake about the age of the girl or boy is a credible defence to a charge under section 346(1)(2)(3). This is so because any offence under that section is an intentional offence, not a strict liability offence as in some jurisdictions. This means an accused is criminally liable only when he "intentionally commits each of the ingredient acts or omissions of [the] offence with the intention of causing the result which completes it." (section 74(2) If the accused was mistaken as to the age of the child (a mistake of fact), intention is lacking regarding that particular element of the offence. The offence is therefore not consummated. Mistake of fact is therefore relevant

here. But the mistake must be genuine and reasonable.

Punishment. Indecency in the presence of an under-16 is punishable by imprisonment for from 2 to 5 years and by fine (section 346(1)). The penalty is doubled in the following circumstances: where the indecency is accompanied by assault, where the offender has authority over or custody of the child, where the offender is a public servant or minister of religion, or where the offender is helped by one or more others (section 346(2)).

Even ‘consensual’ sexual intercourse with an under-16 is indecency with that child, and the offence is punishable by imprisonment for from ten to fifteen years (section 346(3)). Forcible intercourse with a female is of course rape. In the case of rape of an under-16 the penalty for the offence is much enhanced on account of the tender age of the victim. Section 346(4) prescribes a penalty of imprisonment for from fifteen to twenty-five years where a man rapes an under-16 girl. The penalty becomes life imprisonment where the offender at the time of the offence had authority over (e.g., as a school teacher, a doctor, a pastor or priest) or custody of the child (e.g., a parent, guardian or a person in *loco parentis*), or where the offender was a public servant or a minister of religion, or where the offender was helped in the commission of the offence by one or more persons.

The policy of the law, justified, it is submitted, in prescribing these severe penalties is the need to protect children by incapacitating the rapist from mischief for a long while. An additional penalty, which the court may, at its discretion impose, is the accessory penalty that consists in depriving the offender of parental power (if he is a parent) and in disqualifying him for a period of up to five years from being guardian or curator of any person under the age of eighteen years (section 346(5)). Evidently, the period of disqualification only begins to run after the offender has served his custodial sentence.

§4. Homosexuality

The crime of homosexuality is committed when a person “has sexual relations with a person of the same sex” (section 347A) A person convicted of this offence is liable to imprisonment for from six months to five years and a fine.

Abomination. Imprisonment for a maximum of five years is a lenient penalty when it is remembered that long ago in other climes the crime was regarded as an abomination or a form of treason against God (like heresy and apostasy) and the offender was burnt, hanged or drowned. According to Mosaic laws God ordained as follows: “If a man has sexual relations with another man as a man does with a woman, these two men have done a hateful sin. They must be

put to death. They have brought it on themselves.”⁹¹⁶ And when the people of Sodom and Gomorrah persevered in their notoriety in homosexuality God visited all of them with death by fire.⁹¹⁷

Homosexuality is an offence of sexual deviancy; it is a socialized deviant sexual orientation in the sense that it is outside what is the norm, as ordained by nature; for even animals are not known to engage in homosexual connection. The conduct is punishable because it is thought to have a serious adverse effect on the individuals involved. It is thought that the conduct substantially compromises the morals of society. The conduct is also seen as injurious to family structure and a threat to the propagation of the human species.

It was the considered view of the Wolfenden Committee in England in 1957 that the law cannot completely be indifferent to homosexual habits and prostitution-related issues. The Committee’s Report stated that in the field of homosexuality the function of the law “is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.”⁹¹⁸ This statement is as valid today, in this country as in most other countries, as it was in England half a century ago.

Consider, for example, the sentiments expressed by the US Supreme Court in *Bowers v. Hardwick*⁹¹⁹. In that case a police officer entered the home of Hardwick, a resident of the state of Georgia, under a warrant for drinking in public, found him engaged in homosexuality and arrested him for violating the state’s sodomy statute. No charges were however laid against him because the district attorney believed there was little chance of securing a conviction. Hardwick challenged the constitutionality of the statute but the US district court dismissed the case for failure to state a claim on which relief could be granted. The appellate court reversed the decision of the district court on the ground that it failed to recognize the right of privacy for the activity in question.

On further appeal to the US Supreme Court, the majority of the Court upheld the sodomy law on grounds that it furthered Georgia’s interest in preserving morality, and also that the US Constitution does not protect a right to engage in homosexual conduct. Chief Justice Burger explained:

“Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation

⁹¹⁶ Leviticus 20:13.

⁹¹⁷ Genesis 19:23-24.

⁹¹⁸ *The Report of the Committee on Homosexual Offences and Prostitution* (1957), Cmnd 247, §13.

⁹¹⁹ 478 U.S. 186 (1986).

of those practices is firmly rooted in [Judaean]-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law and the Western Christian Tradition. During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. Blackstone described 'the infamous crime against nature' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.' The common law of England, including its prohibition of sodomy, became the received law of Georgia and other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and the statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."

Forms of homosexual conduct. Homosexuality covers a variety of acts whereby sexual gratification is obtained in a manner deemed to be contrary to nature and for this reason is considered an unnatural sexual offence (*venus monstrosa*). Male homosexual behaviour may take the form of mutual masturbation or the form of buggery or sodomy. Buggery is a generic term, which means sexual relations *per anum* (i.e. anal intercourse) by a man with a man or with a woman. However, where anal intercourse takes place between man and man, it is usual to speak of sodomy⁹²⁰, so that the term buggery is sometimes confined to anal intercourse between man and woman and if the sexual relation between the two is through the mouth it is known as *fellatio* or oral sex. Female homosexual conduct usually takes the form of 'fingering', fondling the erotic parts of the body, oral genital contact (*connilinctus*), and penetration *per vaginam* or *per anum* of the passive party (the insertee) by the active party (the insertor) using an artificial penis or a similar object such as a 'vibrator'.

Sexual indulgence between female and female is commonly referred to nowadays as lesbianism. It was at one time held capable of amounting to cruelty to a husband; and an imputation of lesbianism was considered an imputation of unchastity.

Today a divorce court might be inclined to regard lesbianism as unreasonable behaviour and thus as a basis for divorce. And there is no reason why the same would not apply regarding homosexuality. A male homosexual is a sodomite while a female homosexual is a lesbian, and both are these days colloquially referred to as 'gays', a term the use of which is an attempt to dignify homosexual conduct.

⁹²⁰ The term comes from the Biblical city of Sodom where men had intercourse with each other rather than with women (Gen. 19: 4-6). This city's notoriety for homosexuality so incensed God that he "sent a rain of burning sulfur down from the sky on Sodom and Gomorrah and destroyed those cities" (Gen. 19: 24).

Both parties as perpetrators. The crime is committed when two or more people of the same sex have sexual connection with each other. It is immaterial whether or not the passive party is an adult and consented to the act. In fact, consent by the passive party makes that party as much guilty of the crime as the active party. Equally, it is no defence that the homosexual act took place in secret, for the conduct is an offence irrespective of whether the act took place in private or in public. The result is that the law is not lifted even in the case of homosexual conduct in private between consenting adults. Where both parties to homosexuality consented to the act or cooperated in doing it, they are criminally liable as perpetrators, unless one of them is not a consenting party.

Comparatively benign penalty. Section 347A prohibits forcible as well as consensual sexual connection between persons of the same sex. It provides the same penalty for both cases. This is odd when it is considered that forcible buggery is more horrible than rape and that the victim of the offence may be an underage person. In spite of this, the pederast or child sodomite is punishable less severely than the child rapist. The child rapist incurs a penalty of fifteen to twenty-five years' imprisonment and, in certain cases, life imprisonment. The homosexual rape of, or consensual homosexuality with, a teenager over sixteen and under twenty-one years of age is, by comparison, punishable benignly by imprisonment for from one to ten years and a fine (section 347)). In *David Yombo v. The People* (1982)⁹²¹ the appellant, a quack traditional healer, committed homosexual rape when he 'used a teenage boy like a woman' throughout the night.

Gap regarding persons under the age of 16. Strangely, the case of homosexuality with an under-16 (a person even more in need of the law's protection through deterrent punishment) is not expressly addressed. And although the offender in such a case could ingeniously be prosecuted under section 346(3) as an indecent assaulter the penalty for an offence under that section (four to ten years' imprisonment and a fine) is comparatively mild for an offence viewed with such revulsion by the ordinary person in our society.

Offence covers wide range of deviant sexual conduct. It follows from the definition of homosexuality in section 347A (i.e., sexual relations with a person of the same sex) that the crime is confined to mutual masturbation between males (gross indecency), anal intercourse between a man and a man (sodomy), sexual relations by a man with a boy (pederasty), and sexual indulgence between female and female (lesbianism). The section therefore covers forms of

⁹²¹ Criminal Appeal No. BCA/37.c/82, unreported.

deviant sexual conduct which elsewhere have crystallized into separate crimes *eo nomine*, namely, gross indecency, sodomy, paederasty, lesbianism. The section does not cover cases of male or female self-masturbation. The section does not also cover buggery (in the narrow sense indicated above) so that sexual relations between a man and a willing adult female per annum or through the mouth does not constitute an offence if done in private.⁹²²

Consensual buggery between spouses not an offence. It seems odd that anal intercourse between a man and a man should be a crime while the self-same act between a man and a woman is not. It is suggested that the lawmaker may have been impelled to take this discriminatory attitude out of an unwillingness to criminalize conduct that will entail punishing anal intercourse in private between consenting spouses. Seemingly, it is not the law's business how consenting spouses sexually indulge themselves. It is not the office of the law to play Peeping Tom.

§5. Bestiality

Another form of unnatural sexual indulgence not covered by section 347A is bestiality. Bestiality is intercourse *per vaginam* or *per anum* either by a man or by a woman with an animal (whether beast or bird).

No section of the Code specifically deals with bestiality. There is no reason to think that the lawmaker decided to exclude this form of sexual deviancy from the Penal Code. The omission was probably an oversight. In any event the conduct is one that offends against society's decency and morality⁹²³ and can properly be prosecuted, depending on the circumstances of the case, as public indecency (section 263), corruption of morals (section 264 (b)), private indecency (section 295), or even cruelty to animals (section 268). None of these offences however addresses the situation where the detestable act is done in secret. In such a case, it seems, the culprit will escape visitation by the criminal law. As this result is undesirable, it is necessary to statutorily redefine the crime of homosexuality to include sexual conduct characterized as bestiality or, alternatively, to create a distinct bestiality offence.

Whenever they have occurred, bestiality cases whether in this country or abroad, are seldom reported to the police because of the shame and stigma involved for the individual and his/her family. But occasionally a case of that nature does get to the courts. In one country a Magistrate's Court convicted a 49-year old man for having had sexual relations with his female dog. According to the evidence of the man's 47-year-old wife she found her

⁹²² It would however amount to an offence if done in public, or if done in private in the presence of a non-consenting person or in the presence of an under-16 whether or not the child consented. See, sections 263, 295 and 346 (1).

⁹²³ Cf. Leviticus 18: 23; 20: 15-16.

husband having carnal knowledge of their bitch in the bedroom and reported the matter to police.⁹²⁴ In the English case of *R. v. Bourne*⁹²⁵, a husband compelled his wife to have intercourse with a dog. The husband was charged with being an accomplice to buggery (bestiality) committed by his wife. His indictment and conviction were upheld as proper on appeal, despite the fact that his wife was not held liable as perpetrator and despite the fact that he could not personally have committed the particular type of buggery with the dog. The wife was not charged. But it was accepted that she would have had the defence of duress by threats if she had been. The wife committed the *actus reus* of the offence with the relevant *mens rea*. But she was induced to act by the threat made by her husband to the effect that unless she committed the buggery harm would be done to her.

Reasonable minds have always wondered what it is that could possibly push a human being to have sexual connection with an animal. One newspaper came up with the following account.

“Desire for sex, like fire, increases when supplied with fuel, says University Teaching Hospital (UTH) sex crime expert and pathologist, Dr. Mahendra Garg. However, according to Dr. Garg, if the powers of mind, intellect and resolve are not well-coordinated, uncontrolled desire for sex could lead to abnormal sexual instincts. One of these abnormal sexual instincts is bestiality, that is, intercourse with an animal either through the vagina, anus or any orifice which can accommodate the male sexual organ. Females are also known to have offered themselves to animals, especially dogs, for sexual connections but this is not very common and mostly occurs where a female is drugged and forced into bestiality by men who film the act and later sell the video in Europe and America where they fetch huge sums of money. Cases of bestiality involving males are, however, very common in villages where herd boys commit such acts when they take their animals out for grazing. ‘The proximity of the animals and loneliness when we took the animals in the bush to graze excited us into committing bestiality’, a well-known Lusaka-based economist, who spent most of his childhood in the village, confessed recently. ‘We used to ride on the back of the cows and introduced our penis into the vagina and as it moved or changed position, we got our sexual satisfaction.’ This phenomenon is slowly gaining credence in urban areas and nearly every month we read in the local press about a man charged with bestiality in the Magistrate’s Courts. On July 9, last year, a 64-year-old Lusaka man, Wilson Muyoba, appeared before magistrate Faides Chababa accused of having had sex with a pig on June 28, 1997. He admitted having wanted to ‘sleep’ with the pig but claimed that someone came and disturbed him. ‘When I was about to penetrate with my penis, someone came and I stopped,’ Muyoba told the stunned courtroom. After being convicted, Muyoba told the court in mitigation that he was prompted to have sex with the pig because the animal ‘was very attractive’.

⁹²⁴ *The Post* (Zambia), June 22, 1998, p. 4.

⁹²⁵ (1952) 36 Cr App Rep 125.

‘Your honour I am so sorry for what I did. I really embarrassed the country and also myself,’ the shame-faced Muyoba told the court. ‘But I was forced to have sex with the pig because it was so attractive and brown. I looked at its vagina and it was very seducing. I realize what I did was wrong and I am asking for leniency.’ When passing sentence, magistrate Chababa noted that what Muyoba had done was abominable but said she could not send him to jail for the maximum 14 years because of his advanced age. ‘The Bible forbids what you did. You reduced yourself to the level of an animal but I will give you a chance to bring yourself back to a human being. Though the maximum sentence for the offence is 14 years, I will not send you to prison because I want to assist you. I have sentenced you to one year imprisonment suspended for 18 months,’ magistrate Chababa ruled. On August 10, 1997 a 48-year-old Zambia Railways train guard, Bellington Mwiya, appeared before Choma magistrate Mukulwa Mutiyo, charged with having carnal knowledge of his dog on August 1, that same year. But in a dramatic turn of events Mwiya’s wife, Mary Mudenda, who had earlier claimed to have witnessed the incident, refused to give evidence in court and consequently was arrested for ‘giving false information’ to the police and Mwiya was freed. On October 14, a 49-year-old peasant farmer from Chongwe area in Lusaka, Collins Zenda, appeared before Lusaka magistrate Victoria Mushibwe, charged with having carnal knowledge of a dog. ...On April 29, this year, Zimbabwe’s Herald newspaper ran a story about a goat in Mandani Farm, near the town of Masvingo in the southern part of the country which had given birth to a creature with features of a human being. According to the paper, the creature had a human head and face while the front and hind legs had fingers and nails. It also had an umbilical cord similar to that of a human being. Some elders said it was an act of superstition but the Zimbabwean police said they could not rule out bestiality. The creature died days later and its remains have since been taken to the University of Zimbabwe for studies. It is difficult to pin-point what causes bestiality but, according to Dr Grag, depression, maladjustment, bad company, neglect, obscene displays, heredito-familial (following in the footsteps of one’s parents) and love starvation are some of the causes of bestiality.’ They bring forth an inferiority complex which produces tremors in one’s mind and changes the mental attitude,’ Dr Grag says. ‘Such sex activities are not only harmful to the persons who are involved but also take away normal mental peaceful attitudes, cause diseases and depression and give birth to unwanted and countless anti-social activities.’”⁹²⁶

§6. Prostitution and cognate offences

There are three sections in the Code that create a number of offences relating to prostitution and cognate crimes. Section 294 deals with ‘immoral earnings’, section 343 with prostitution *per se* and soliciting, and section 345 with ‘moral danger’ (i.e., allowing an under-18 to live or work in a brothel or in the house of a prostitute). The philosophy of the Code appears to be that ‘immoral earnings’ is a crime against personal liberty while ‘prostitution’ and ‘moral

⁹²⁶ *The Post* (Zambia), Friday, June 19, 1998, p. 17.

danger' number amongst crimes against the family and the child. This is suspect logic. These offences are more properly viewed as crimes against morality.

It is trite observation that prostitution is the oldest profession in the world, having been practised since Biblical times⁹²⁷.

One can distinguish three types of responses to the phenomenon of prostitution. "The first is a total prohibition of all aspects of prostitution. The second is a toleration of prostitution in all its manifestations under officially imposed safeguards achieved through the licensing and, in some cases, zoning, of prostitutes and brothels. The third approach is a combination of the two approaches described above: according to this approach prostitutes and prostitution are tolerated but time, place and method are regulated by criminal prohibitions. Neither being a prostitute nor having intercourse with one is a crime, but the law does prohibit solicitation by prostitutes, procuring of women as prostitutes and the keeping of brothels."⁹²⁸

It is evident from the provisions mentioned above that the Code's approach to the phenomenon of prostitution is that of total prohibition of prostitution in all its aspects. This approach is both unrealistic and hypocritical. Prostitution is a private sexual activity between consenting adults. The appropriateness of making it the object of punishment is doubtful. Despite the law's prohibition prostitution has not reduced one bit. If anything, it continues to be on the increase, involving not just the professional prostitute (that is, the 'sex worker' as she is prudishly called these days) but also women of various backgrounds, employed or unemployed, who engage in it in a more or less sophisticated way. Examples are the girlfriend or the concubine who is 'kept' by a man, the female student whose school fees are paid by her lover, the woman who lavishes sexual favours on a man in exchange for paying the monthly rents for her accommodation or providing her with money for necessities and so on.

The history of prostitution attests to the fact that the phenomenon cannot be eliminated. It is therefore wishful thinking to suppose that the criminal law can eradicate mankind's oldest and most intimate profession. It would have been realistic for the Code to adopt the regulatory approach. The more so because despite the obvious increase in the phenomenon of prostitution, the

⁹²⁷ Genesis 38: 15-18 (Judah had sexual intercourse with his daughter-in-law thinking she is a prostitute and gave her his seal as payment for the sexual services); Joshua 2: 1 (the two spies Joshua sent to the city of Jericho stayed at the house of a prostitute named Rahab); Deuteronomy 23: 17-18 ("No Israelite man or woman must ever become a temple prostitute. Do not bring a male or female prostitute's pay to the Temple of the Lord your God to pay what you have promised to the Lord, because the Lord your God hates prostitutes."); Leviticus 21: 9 ("If a priest's daughter makes herself unclean by becoming a prostitute, she shames her father. She must be burned with fires."); Proverbs 5 and 7.

⁹²⁸ Snyman, *Criminal Law*, p. 351.

crime is hardly ever prosecuted: the act can easily be passed off as mere fornication, which is not and cannot be a crime; evidence of payment for sexual intercourse is hard to come by; and trying to spy on or entrap suspected or known prostitutes is a waste of scarce police time, manpower and material resources. In England, the Wolfenden Committee was realistic when it advised that prostitution should continue to be regarded as a permitted occupation, though subject to severe restrictions.

Prostitution. It is an offence under section 343(1) for a person of either sex to habitually engage in sexual acts with another for remuneration. On conviction the offender is liable to imprisonment for from six months to five years and a fine. The provision is a dead letter. There is no known case of a prosecution for prostitution. In terms of the section the offence is capable of being committed by a man or a woman. The provision clearly recognizes and contemplates the phenomenon of male prostitution as well.

It is an ingredient of the offence that the sexual act be habitual. This is a question of fact, which the court determines from the evidence adduced in court. If the evidence elicited points to a single occurrence only the requirement of habitual-ness is not met. Twice would probably not suffice either, but several times certainly would. When something is done twice it is hardly correct usage of language to say the thing was done habitually. ‘Habitually’ means done constantly or as a habit; done regularly or repetitively.

The habitual sexual act need not have taken place with the person now charged along with the principal offender (i.e., the prostitute). If **A** habitually engages in sexual acts with several people for reward and engages in the same act only once with **B** for remuneration, the offence is consummated by **A**, not **B**.

The phrase ‘sexual acts’ indicates that the crime is not limited to acts of sexual intercourse but includes all acts of sexual indulgence, homosexual as well as heterosexual. A person who habitually does a pelvic massage for reward or who habitually strips for reward is as much a prostitute as the person who habitually has intercourse *per vaginam*, *per anum* or otherwise for reward. The law of prostitution under section 343 (1) of the Penal Code is well illustrated by the decision in the English case of *R v. Munck*⁹²⁹. A mother was charged, inter alia, with having attempted to procure her daughter, nearly 15 years of age, to be a prostitute. The mother permitted the girl to take men home to the house where she herself was living and allowed those men to be in private with the girl in circumstances which would have led anyone to suppose, but for the medical evidence which proved that she was *virgo intacta*, that the girl had had connection with them.

The trial judge directed the jury that the term ‘prostitute’ was not

⁹²⁹ [1918] 1 K.B. 635.

necessarily confined to a woman who for gain offered her body for natural intercourse but also includes offering her body for gain for the gratification of the sexual passions of any man by any unnatural and abnormal act of indecency. The jury was satisfied that there had been lewd conduct between the girl and the men who were brought to the house, that the girl exposed herself to them for the gratification of their sexual passion. The mother was therefore convicted. The legal implication of the decision in this case is thus that prostitution may arise where a man and a woman take part in physical acts of indecency even if there is no actual sexual connection between them.

Munck was applied in *R v. Webb*⁹³⁰. The defendant, who ran an institute of massage for men, was indicted for procuring a woman to become a prostitute and also for living on the earnings of prostitution. Three girls who were formerly masseuse at the institute gave evidence that they understood it to be part of their job to masturbate the men who asked them to do so, and one of them stated that she had done so. The defendant denied instructing the girls to act in that way and contended that, if they had, they had done so on their own accord. The court held that since the girls had done the alleged acts they had acted as prostitutes. It was further stated by the court that prostitution included a case such as this where a woman offered herself as a participant in physical acts of indecency for the sexual gratification of men in return for payment. The defendant was convicted.

Reward or remuneration is the distinctive element of the offence. It is what differentiates prostitution from mere fornication, which is not punishable. Sexual indulgence without reward is not prostitution no matter how habitual or widespread. In the crime of prostitution the person who receives the reward for the sexual act is guilty as a prostitute, the client who pays for the sexual act is guilty as accessory to prostitution. Provided the sexual activity is offered on a commercial basis, the nature of the remuneration is immaterial. Payment may be by cheque; it may be in cash, in money's worth or in kind. It may consist in paying the prostitute's rents and utilities bills or in giving her/ him 'food' money, in exchange for regular sexual favours. Judah paid for Tamar's sexual services with his identification seal⁹³¹. The time of payment is also immaterial. It may be before or after the sexual act.

Soliciting. Whoever publicly solicits by gestures, words or writing or by any other means, another person of the opposite sex for the purpose of prostitution or debauch is guilty of an offence under section 343(2) and liable to suffer the same penalty as for prostitution.

The person soliciting may be a male, in which case the person solicited must be a female. The person soliciting may be a female also in which case the

⁹³⁰ [1964] 1 Q.B. 357.

⁹³¹ Genesis 38: 15-18.

person solicited must be a male. Furthermore, the person soliciting is liable to conviction under the section whether he does so for the purpose of his or her own prostitution or debauch, or for the purpose of the prostitution or debauch of a third party. **A** may solicit **B** to have sexual intercourse with **A** for reward. **A** may solicit **B** to have sexual intercourse with **C** for reward. In the first case **A** may be charged with two offences, soliciting and prostitution. In the second case **A** may be charged with soliciting, **C** with prostitution and **B** with accessoryship. However, the charge will succeed only if the requirement of habitual-ness is satisfied. This requirement is however not necessary in the case where the soliciting was for the purpose of debauchery.

The method of soliciting is immaterial. It may be by a wink, a sign or signal, a whistle, an inviting noise or call, call cards, notices, advertising, or standing or walking or loitering invitingly in an area known to be frequented by prostitutes; provided always that the method used is public. The method is public if it is intended to reach the public or is in a public place or a place open to the public such as a thoroughfare, a square, a court, a bridge, a doorway, hotel premises, nightclubs, a lavatory, entrances of premises abutting on a street, and any ground adjoining and open to a street.

Procuring. This is one of three offences created by s.294 under the general title ‘immoral earnings’. In terms of section 294 (1) anyone who “procures ... another’s prostitution, whether habitual or otherwise” is guilty of an offence.

The formulation of this offence is infelicitous. It is inapt to talk of procuring the prostitution of someone. A person can procure something for somebody or somebody for somebody; but a person cannot procure somebody’s occupation. Though badly formulated the offence appears to be intended to cover two situations: procuring a person to become a prostitute, and causing the prostitution of another person. Both situations imply a measure of initial unwillingness on the part of that person, an unwillingness overcome by the procurer’s active intervention.

Procuring a person to become a prostitute means getting or obtaining that person to engage in commercial sex, that is, make the person available to willing sex clients. The common case is that of the man who lives off the earnings of a prostitute or a brothel, as where a person, whether male or female (known as a pimp, a pander, a ponce, or a procurer) makes a living by finding prostitutes for clients or clients for prostitutes. However, it is doubtful that the provision catches the owner or manager of a brothel. Such a person does not procure. He merely provides a facility. At worst he is a facilitator, not a procurer.

To cause the prostitution of another person means to entice or inveigle a person into prostitution. The procurer must do something positive to obtain the woman or man; he/she must exercise some measure of persuasion, fraud

or coercion on him/ her. In either case the procurer's task is easy if the person is poor and in need of money. It is a characteristic of a procurer that he/she induces another to have intercourse not with the procurer but with somebody else. If the procurer induces another for the purpose of having intercourse with that person there is mere procuring for fornication, which is not an offence.⁹³²

Aiding or facilitating another's prostitution/keeping a brothel. A person who "aids or facilitates another person's prostitution ... whether habitual or otherwise is also guilty of an offence under s. 294 (1). Aiding and facilitating prostitution may take a variety of ways. But the commonest ways are the keeping of brothels and the activities of outfits that go by the arcane name of 'escort agencies'.

Keeping a brothel is not a separate offence as such but may be properly prosecuted as 'aiding and facilitating prostitution'. A brothel, as generally understood includes any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful sexual intercourse or for any other lewd purpose. Section 294(1) would bite where a person keeps a brothel or lets premises for use as a brothel or continues the lease of premises so used or permits a tenant or other occupier to use the whole or part of the premises for prostitution or permits a hotel, lodge, guesthouse or motel to be used by persons for the purpose of having unlawful sexual intercourse. A prostitute's home becomes a brothel if that is where she regularly plies her trade.

Living on the earnings of prostitution. A person offends against section 294(1) again if he/she "shares in the proceeds of another's prostitution, whether habitual or otherwise, or who is subsidized by any person engaging in prostitution." There is a rebuttable presumption of law, created in section 294(2), that a person living with a prostitute is subsidized by the prostitute. This presumption can however be rebutted by proof that the defendant's own resources are sufficient for the defendant to live on. The only purpose of this rebuttable presumption is assuredly to help the prosecution to prove that the defendant was knowingly living on the earnings of prostitution.

The offence of living on the earnings of prostitution is designed to catch pimps, as well as landlords who exact exorbitant rents from tenants known to be prostitutes. If construed literally the words in sub-section (1) of section 294 would seem to include any professional man who acts for a prostitute in the way of his profession, any tradesman who deals with the prostitute and any relative or other person who lives with the prostitute or who gets assistance

⁹³² Even if it amounts to 'sexual harassment' it is not an offence under the criminal law of this country.

from the prostitute. A prostitute who has a legal matter or a medical problem or who has bought goods from a businessman would pay the lawyer, the doctor and the trader, as the case may be, from earnings of her prostitution. These professionals would then be sharing in the proceeds of the prostitution. A prostitute may have children and may have obligations towards other relatives, providing for all of them. The children and the relatives are clearly subsidized by the prostitute or sharing in the proceeds of her prostitution. It is doubtful that the legislative intent was for section 294(1) to be used to catch anyone who gets money from a prostitute, for if that were so the prostitute would in effect become a pariah in society, a social outcast. It is submitted that the words in that provision must be limited in some way.

Accessory. A prostitute is not treated as accessory to any offence under section 294. It is so provided in section 294(7). There is no persuasive reason for this rule. Suppose that a man who has a woman lodger permits her to use her room for prostitution. The man clearly commits an offence under section 294(1) (that of aiding or facilitating another's prostitution). Why then should the woman not be guilty as accessory since prostitution per se is an offence under section 343(1). While it is clear that to aid or facilitate another's prostitution means to abet it, a crime can be doubly inchoate. In any even 'aiding or facilitating another's prostitution' is a substantive crime. Moreover, if a man procures another person to become a prostitute or if a man lives on the immoral earnings of a prostitute, why may the prostitute not be liable as accessory to any of these offences? In spite of the 'her' in section 294(2) and the 'herself' in section 294(7) it is clear from section 294(1) that the law contemplates not only the female prostitute but the male prostitute as well, though of course prostitution is generally associated with females.

Punishment. The ordinary penalty for any of the offences under section 294 is imprisonment for from six months to five years and a fine. The penalty is doubled and the court may cumulatively impose the accessory penalty known as 'closure of establishment' in any of the circumstances of commission of the offence stated under sections 294(3) and 298.

Section 298 doubles the penalty for an offence under section 294 where the offender has authority over or custody of the victim or where the offender is a public servant or minister of religion or where the offender is helped by one or more others. Section 294(3) doubles the penalty where the offence was accompanied by coercion or by fraud, where the offender was armed, or where the offender is the owner, manager or is otherwise in charge of an establishment where prostitution is habitually practiced. That provision also doubles the penalty where the 'victim' of the offence is an under-21. It further doubles the penalty where the offender is a parent or guardian of the 'victim'.

Section 294(4)(5) further empowers the court to impose, cumulatively, accessory penalties (forfeitures) and certain measures (recognizance) against a person convicted of and sentence for an offence under section 294(1).

Sub-section (4) directs the court to apply the provisions of section 48 (recognizance by parents) “in the cases referred to under subsection (3)”. This is odd. Section 48 deals with recognizance by parents and enables the parents or other persons responsible for persons under the age of eighteen to be bound over to take steps to ensure that the under-18 does not repeat his delinquent behaviour. Section 48 contemplates the case where the under-18 is the offender. It is not the under-18 but his parent or other person responsible for him who is bound over. Section 48 cannot therefore apply to any of the cases envisaged under section 294(3). The relevant cross-reference would probably be s. 46 and not section 48. But even the reference to section 46 would not dispose of the ambiguity. Section 46 can be invoked only where no offence has yet been committed, albeit that there is “an unambiguous intention to commit an offence”; whereas in the cases contemplated under section 294(3) an offence would have been committed. It is submitted that s. 48 (and even section 46) have no relevance to section 294(1)(3) and that section 294(4) was added without careful thought.

Offences against the Family

Unlike in the past the child and the family now enjoy wide protection under municipal and international law.⁹³³ Protection of the child is warranted by the fact of the child's immaturity and consequential vulnerability to exploitation. The family deserves the protection of the law because the family is the natural and fundamental element in society, the great nurse of morals and the chief source of cooperative and communistic habits. In municipal law a number of rules and principles in disciplines such as contract law, tort law, family law and criminal law are designed to protect the child and/or the family. For example, protection under criminal law consists in the prohibition of conduct considered harmful to the morality and welfare of the child or to the stability and cohesion of the family. There are here two predominant interests that the criminal law seeks to protect, the interest of the child and the interest of the family.

§1. Offences against the child

1.1. Moral danger

It is provided in s. 345 that "whoever, having by law or by custom custody of a person under eighteen years of age allows him to reside or work in an establishment where prostitution is habitually practiced, or to work in a prostitute's house shall be punished with imprisonment for from fifteen days to six months and with a fine."

⁹³³ Under international law, for example, there is an impressive number of instruments bearing on the rights of the family and the rights and welfare of the child: Article 16 of the Universal Declaration of Human Rights, 1948; Article 10 of the International Covenant on Economic, Social and Cultural Rights, 1966; Articles 23 and 24 of the International Covenant on Civil and Political Rights, 1966; the Declaration of the Family Rights, adopted in 1994 by the General Council of the International Union of Family Organization; the UN Declaration of the Rights of the Child, 1959; the UN Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1985; UN Convention on the Rights of the Child, 1989; Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, 2000; Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, 2000; UN Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding between People, 1965; UN Basic Principles on the Prevention of Juvenile Delinquency (the Riyadh Principles), 1990; UN Rules for the Protection of Minors under Custody, 1990; UN Minimum Rules Relating to the Administration of Juvenile Justice (the Beijing Rules), 1985; the Hague Convention on Cooperation and Protection of Children with Reference to Adoption Internationally, 1993; ILO Convention No. 138 on the Permissible Minimum Age for Employment, 1973; ILO Convention No. 182 on Worst Forms of Child Labour, 1999; and the African Charter on the Rights and Welfare of the Child, 1990.

Interest protected. This crime seeks to protect youths from exposure to immorality thereby ensuring the preservation of their moral integrity. The section creates three offences: allowing an under-18 to reside in an establishment where prostitution is habitually practiced, allowing an under-18 to work in an establishment where prostitution is habitually practiced, and allowing an under-18 to work in a prostitute's house.

Establishment. The word 'establishment' refers to the premises of an organized business set-up such as a brothel, hotel, motel, guesthouse, Inn, lodge and so on. The term does not include a dwelling house even if prostitution is habitually practice therein.

Person having custody. The offence punishes guardians, and not parents, who permit the prohibited conduct. It is therefore not an offence for an under-18 (and, *a fortiori* for a person above eighteen years of age) to reside in a prostitute's house. If it were otherwise, an offence under section 345 would be committed where a prostitute allows her under-18 child or relative to live with her or where parents allow their under-18 child to live with their adult child who is a prostitute. Of course, to allow a youth to reside with a prostitute is morally reprehensible for in that case the moral integrity of the youth will not be any less injured than where the youth resides or works in an establishment where prostitution is habitually practiced. However, the law appears to have taken 'judicial notice' of the prevailing social context. Many prostitutes have children and live with them and often with relatives as well. Generally prostitutes do not take their customers to their homes because they are aware of the adverse moral effect the trade they ply might have on those living with them.

Reside. To reside in a place means to live there, that is, make it one's habitual abode. It does not therefore seem that the offence is committed in the case of a temporary stay in or merely frequenting the targeted place.

Work. Taken literally the term 'work' means any kind of job and whether remunerative or not. Supposing, as is not uncommon, that a neighbour, at the request of a prostitute, allows her under-18 ward to do some house chores for the prostitute. Supposing again that a 17 years' old plumber or painter or gardener were to do piece work at a prostitute's premises or in an establishment where prostitution is habitually practiced. It is submitted that the prosecution of the guardian of the under-18 in either of these two cases would fail. First, in order to avoid an absurd result the word 'work' in the context of s. 345 must be taken to mean 'paid work'. Secondly, the remunerative work must be in respect of regular employment in the prostitute's house or in the

establishment where prostitution is regularly practiced. A guardian, who allows an under-18 to be employed in a prostitute's house as, say, babysitter or house help, can properly be prosecuted under this section.

Perpetrator. Under s.345 the perpetrator of the offence is not the under-18 (he is, in contemplation of law a mere victim) but the guardian of the under-18 who allowed him to reside or to work in the targeted place. The guardian has a credible defence if he did not allow the prohibited conduct or if he was unaware that the house in question is that of a prostitute or that the establishment in question is a nest of prostitution.

1.2. Cloud on parentage

Any person *whose conduct* has the result of depriving a child of the evidence of his true parentage is guilty of an offence known as 'cloud on parentage'. The crime is found in s. 341 and carries a mandatory custodial sentence of five to ten years.

Contemplated conduct. The offence is concerned with conduct that results in depriving a child of the evidence of his/her true parentage. The substance of the offence is the fact of the defendant, by his conduct, depriving a child of the evidence of the identity of both or either of his/her biological parents, whether long dead or still alive. There is a close connection between this offence and the subject of the child's civil status. What the law punishes here is conduct that makes it almost impossible for the child to establish his/her biological affiliation. For example, the removal of a child under circumstances that his identity is necessarily lost; bringing up a child and hiding him under a name that is not his thereby making him to lose his true identity which can then only be established following a complicated court process; giving a child a false civil status by fraudulently representing him to be the child of a woman who is not his true mother.

Section 341 will also catch the person who, for example, destroys a child's birth certificate or like document, or kills or swears to secrecy the doctor, midwife or other witness present at the child's birth with intent to deprive the child of evidence of his true parentage.

Specific conduct by defendant. In order to secure a conviction under this section the prosecution must show that the defendant did something specific that resulted in depriving a child of his/ her true parentage. For example, destroying records relating to the child's birth, making forged documents relating to the child and in which the child's parentage is faked, refusing the child access to records that would establish his true parentage, and so on. The 'depriving' need not be permanent. In other words it is not necessary for the

prosecution to show that the impugned conduct resulted in permanently depriving the child of evidence of his/her true parentage. But the offence under the section is not consummated if the impugned conduct merely made the evidence of true parentage a bit more difficult to come by or if the conduct simply amounted to a temporary deprivation of the child of evidence of his/her true parentage.

Types of conduct not within the section. The offence is not concerned with the sort of conduct which consists in the disposal of the body of a child already dead with intent to conceal the fact of its birth. For example, a child dies before, during or after birth and its mother (usually the case) disposes of the dead body so as to conceal the fact that she was ever pregnant or has given birth. This kind of conduct is punishable in some jurisdictions as ‘concealment of birth’. But there is no such offence, *eo nomine*, in this country.

However, if the manner in which the child’s body was disposed of amounts to offering indignity to it (which would most likely be the case, as where the dead child is hastily buried in a shallow grave or is dumped in a pit latrine or is abandoned in a nearby bush) a charge of ‘violation of corpse contrary to section 274 (1)(6)’ should be laid. And if the death of the child was felonious the crime of abortion (section 337), assault on child being born (section 338), infanticide (section 340), assault on child under fifteen years of age (section 350), or murder (section 275, section 276), as the case may be, would have been committed.

Section 341 is also not concerned with failure to declare the birth of a child to the registrar of births within the prescribed period. Such conduct is a mere simple offence punishable under section R. 370(11) by imprisonment for from five to ten days and a petty fine.

Basis of the offence. Section 341 is predicated on the theory that a child has the right to know the identity of his/her biological parents. Any conduct by any person that has the result of depriving the child of evidence of that identity is punishable.

1.3. Slavery and related offences

Section 293 creates and punishes four ‘slavery offences’, three under sub-section (1) and one under sub-section (2). The three offences under sub-section (1) are: (i) enslaving a person, (ii) keeping a person in slavery, and (iii) engaging (whether habitually or otherwise) in any traffic in persons. The penalty for any of these three offences is imprisonment for from ten to twenty years where the victim is a person above the age of eighteen years (section 293(1), and imprisonment for from fifteen to twenty years where the victim is an under-18 (section 342(a)).

Sub-section (2) of section 293 creates the crime of ‘debt bondage’, punishing both the giver and the receiver of a human being as security for a debt. The prescribed penalty is imprisonment for from one to five years and a fine where the victim is a person above the age of eighteen years (section 293(2), and imprisonment for from five to ten years where the victim is an under-18 (section 342(b)). In either case the court may in addition impose the forfeitures describe in section 30 of the Code.

Historical. A slave is a person who is the property of another and is forced to work for him. Until the twentieth century slavery was a legally permitted labour system. The word slave appears to have originated from the Russian word ‘*slava*’, the meaning of which is quite the reverse of the meaning of slavery. ‘*Slava*’ means glory or fame. The term was used to refer to those peoples in Eastern Europe now known as ‘Slavs’. However, the ‘Slavs’ became bondsmen following their capture by the Huns, a warlike Asiatic nomadic people who invaded and ravaged Europe in the 4th-5th century. From then on the word ‘slave’ came into use to describe a servant without privilege.⁹³⁴

Two forms of customary slavery existed in traditional Africa. The first form is the slavery of persons captured in inter-tribal wars. The second form is the slavery of those who gave themselves or were given into bondage of creditors for unpaid debts either incurred by themselves or a relative. It was a practice akin to the practice of human surety known in medieval English law as a ‘pledge’. The colonial authorities proscribed and criminalized these forms of slavery. The prohibitions have remained in the statute books.

Today, classical slavery and the system of pledge of a human being as a guarantee of debt are offences not only under municipal law but also under international law. Slavery as an offence against the law of nations has been brought within the scope of international conventions⁹³⁵ and is dealt with on the basis of *aut punire, aut dedere* (that is, the offenders are either to be punished by the State on whose territory they are found or to be surrendered to the State which is competent and desirous of exercising jurisdiction over them).

In international human rights law slavery is a term that covers a variety of human rights violations that go beyond traditional slavery, slave trade and debt bondage, and includes such slavery-like practices as sale of children, child prostitution, child pornography, the exploitation of child labour, the sexual mutilation of female children, the use of children in armed conflicts, sex

⁹³⁴ T.O. Elias, *The Nature African Customary Law*, Manchester, 1956, p. 107, fn1.

⁹³⁵ Slavery Convention, 1926; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956; Slavery Convention, 1953; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949; Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, 2000.

slavery, traffic in persons and in the sale of human organs, exploitation of prostitution, and pernicious practices that have the effect of collective/group slavery.

Meaning of ‘slavery’. Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. Slave trade involves all acts involved in the capture, acquisition or disposal of a person with intent to reduce him into slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.⁹³⁶

Meaning of ‘debt bondage’. This is the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are respectively limited and defined.⁹³⁷

A cognate practice that is also similar to slavery is ‘serfdom’. This is the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status.⁹³⁸

The Supplementary Convention on the Abolition of Slavery in sub-articles (c) and (d) of Article 1 also considers as similar to slavery any institution of practice whereby: (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; (iii) a woman on the death of her husband is liable to be inherited by another person; or (iv) a child or young person under the age of eighteen years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

In terms of the Convention therefore bride price, widow inheritance, and the practice of giving an under-18 to a tradesman to work as an apprentice are all practices similar to slavery and prohibited under international law. This is controversial. It is in part one reason why the convention has been ratified by only a few states.

⁹³⁶ Slavery Convention, 1926, Article 1.

⁹³⁷ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, Article 1 (a).

⁹³⁸ Ibid, Article 1 (b).

Meaning of ‘trafficking in persons’. The expression is understood in international law to mean “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁹³⁹ The consent of a victim of trafficking in persons to the intended exploitation is irrelevant. Furthermore, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is considered ‘trafficking in persons’ even if this does not involve any of the means set forth in the definition of that expression.

1.4. Youths and drinks

Section 348(1) creates three distinct offences, two of them capable of being committed only by a person who is a licensed publican, and one by just anybody, including a publican. The first offence relates to the *admission*, by a publican, of an under-16 in his business premises. The second relates to the *selling or offering*, by a publican, of intoxicating liquor to an under-18. And the third offence punishes whoever *makes an under-21 drunk*.

Limited intentment of the provision. The offences created by s. 348 (1) do not forbid the licensed publican to admit an under-16 into his on-licence or off-licence liquor bar. They do not prohibit him from selling or offering intoxicating liquor to an under-18. In fact, none of these offences prohibits an under-18 from consuming alcohol or from even getting drunk. So long as the under-age person is accompanied by a person above 21 years of age responsible for superintending him, he may indeed be admitted into a public house, be sold intoxicating liquor or be offered the same.

In respect of an off-licence liquor bar the under-age need not even be accompanied by anyone in order to be sold alcoholic drinks. Section 348(1)(c), be it noted, punishes anyone who *makes an under-21 drunk*; it does not ban the under-21 from ‘drinking’ or from drinking himself drunk. The self-induced drunkenness of a person below the age of twenty-one is not an offence under the provision. The under-21 may consume as much alcohol as he possibly can

⁹³⁹ Article 3 (a), Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime.

and may even take ‘one for the gutter’ provided his drunkenness is not of anyone’s making. A person does not make another drunk simply by the mere fact of offering or selling him intoxicating liquor. He must go further by actively encouraging or inducing or tricking him to drink too much.

Conduct caught under the provision. Section 348(1) punishes the licensed publican or victualer who admits into a public house an under-16 who is not accompanied by an adult responsible for superintending him. It also punishes the licensed publican who sells alcoholic drinks to an under-18 who is not accompanied by an adult responsible for superintending him. It further punishes the licensed publican who offers alcoholic drinks to an under-18 who is not accompanied by an adult responsible for superintending him.

It finally punishes anyone (whether a publican or not and whether in a public house or not) who makes an under-21 drunk. The place where the under-21 is made drunk (in a bar, at home, at a party or wherever) is immaterial. The manner in which he is made drunk (whether by giving him too much to drink or by plying his glass of soft drink with some spirit or by inducing him to try out different kinds of alcoholic drinks) is also immaterial.

Weakness of the law. Given the limited intendment of section 348(1), its social utility and protective value must be open to serious doubt. The purpose of the law should have been to keep youths away from alcohol. There should have been an absolute ban on persons below 21 years of age from going into pubs or being sold or offered intoxicating liquor. In some homes parents might turn a blind eye to their children under the age of 21 helping themselves to alcoholic drinks from ‘daddy’s cellar’. That is something which calls into question parental responsibility in this regard.

The weakness of the law as it stands lies in the concession it makes that a youth may be accompanied into a drinking place by an adult. This concession takes the sting out of the section 348(1) offences. A similar weakness is noticeable in section R. 368 (7), which punishes by a ludicrous fine⁹⁴⁰ “those who employ in premises licensed for the consumption of alcoholic beverages any woman of less than eighteen years of age *with the exception of members of the family of the licensee.*” The words in italics have the effect of rendering the prohibition nugatory. The offence is easily circumvented by employing in pubs persons below the age of eighteen under pretext that they are members of the family of the licensee.

Licensee vicariously liable. The person capable of committing an offence under section 348(1)(a) or (b) is a licensed publican. But the licensee need not be the person actually involved in the impugned conduct. It may be his

⁹⁴⁰ Of from 1 400 to 2 400 francs.

servant. The licensee will still not escape criminal liability since the servant acts as his *alter ego*. It is settled law that where a person having a public licence delegates to a servant the management of the business in respect of which the licence is granted, the licensee becomes vicariously liable for the acts as well as for the states of mind of his delegate. The absentee licensee is regarded as infected by the knowledge of his servant. So, under section 348(1) if a bartender, for example, to whom the licensee has delegated the running of the bar, intentionally ‘admits’ or ‘sells’ or ‘offers’, then the absentee licensee can be convicted of intentionally ‘admitting’, ‘selling’, or ‘offering’, for it is in law the licensee who admits, sells or offers (through the instrumentality of the bartender), and the bartender’s intention is imputable to his master. It makes no difference in law, so it seems that the conduct of the bartender may have been contrary to the licensee’s express orders.

Defence. Section 348(3) creates a specific defence of mistake as to the age of the youth or as to the age or the authority of the person accompanying the youth. The mistake must, however, be *bona fides*. The defendant must prove that his mistake was based on reasonable grounds. As in the case of intention, the servant’s *bona fides* mistake is imputed to his master, the licensee.

Punishment. The prescribed penalty for an offender section 348(1) is a relatively benign fine⁹⁴¹. A subsequent conviction entails a custodial sentence of from two weeks to one month and a pecuniary sentence⁹⁴². This is without prejudice to the court’s discretionary power to order closure of the licensed premises and publication of its judgment, and to impose forfeitures as against the offender.

1.5. Advantage of weakness

A person commits an offence punishable by imprisonment of from five to ten years and by a fine⁹⁴³ if he “takes advantage of the needs, weakness or passion of any person under 21 years of age to induce him to sign any obligation, discharge or disposition, or any other document liable to harm the signatory in his person or in his substance.”⁹⁴⁴

Victim. The victim of this offence can only be a person under 21 years. Children are the group of persons targeted here for protection. However, for the purpose of this offence a lunatic or a spendthrift (a wastrel or prodigal son), albeit that his chronological age may be above 21, is treated as a person

⁹⁴¹ From 5 000 to 50 000 francs.

⁹⁴² From 10 000 to 100 000 francs.

⁹⁴³ From 100 000 to 1 million francs.

⁹⁴⁴ Section 349(1).

aged below 21 years.⁹⁴⁵

There is no suggestion that the weakness, needs and passions of only an under-21 can be taken advantage of. The essence of an offence of this nature is the fact of taking unconscionable advantage of another's weakness, needs or passions by inducing him to sign a document detrimental to the signatory. Everyone, irrespective of age, has weakness, needs and passions that may be detrimentally exploited by an unscrupulous person. Had the draftsman so wanted he could have simply created a general 'unconscionable-advantage' offence with an enhanced penalty where the victim of the offence is a minor, the justification for the increased penalty being the vulnerability and impressionability of young people.

Proof of actus reus. For a charge under section 349(1) to succeed the prosecutor must not only prove that the victim is below 21 years of age. He must go further to prove the other physical elements of the offence.

- i. It must be shown that the defendant took advantage of the weakness, needs, or passions of the victim. Taking advantage of some other condition such as the victim's illiteracy, the victim's physical disability, the victim's status as an orphan or a single person or an indigent person, etc. will not do. These conditions doubtlessly make the person vulnerable to abuse. But in themselves they do not amount to 'weakness', 'needs' or 'passion'. 'Weakness' refers to physical weakness as well as to the inability to resist a particular temptation. The 'needs' and the 'passion' must be lawful or legitimate.
- ii. It must further be shown that the victim was induced to sign a document detrimental to himself. If the under-21 was not coerced, misled or tricked into signing but signed voluntarily with full knowledge of the fact, the offence is not committed.
- iii. Finally, it must be shown that the signed document was liable to harm the signatory in his person or in his substance. The document need not actually have jeopardized the signatory in his person or in his substance. The law requires only that it was liable to do so.

1.6. Kidnapping

Child-kidnapping offences. The Code creates three types of child-kidnapping offences, namely, kidnapping an under-18 albeit that no force or fraud is used in the process (section 352); kidnapping an under-18 by force or fraud (section 353); and aggravated kidnapping (s. 354). It is clear that the person capable of committing any of these offences may be a male or a female and that the victim may be a male or a female person. None of these offences

⁹⁴⁵ Section 349(2).

requires proof of corrupt motive or a particular intent or purpose on the part of the accused. It follows that the absence of such motive or intent cannot be an answer to a prosecution for any of these offences.

Terminology. The word ‘kidnapping’ is used here as a general term embracing kidnapping *stricto sensu*, abduction, elopement and what used to be called ‘child-stealing’. Etymologically to kidnap means to nab or grab a child, that is, to steal it. However, the usual meaning of the word is the illegal carrying off of a person, especially to obtain ransom. The term ‘abduction’, comes from the Roman *raptus*, and means carrying off, especially a woman or child, illegally by force or deception. At law therefore the carrying away of females is usually termed abduction.

When a man and a woman run away to get secretly married, they are said to have eloped. This is often done to defeat some legal condition for marriage relating to form or substance. Marriage by elopement (also known as marriage by capture or by abduction) was a form of marriage under African customary law.⁹⁴⁶ In the colonial days this form of marriage quickly became vulnerable under the repugnancy clause of the reception statute. The view taken by the colonial authority was that this form of marriage was devoid of the girl’s prior consent and that therefore it was a form of marriage entered into by force. On this reasoning marriage by abduction or by elopement was considered forced marriage and outlawed on that ground. It was then decreed that a marriage was valid only when it can be shown that the would-spouses freely gave their consent to it. It thus seems to be the case that the kidnapping offences in the Code were meant to give teeth to the outlawry of ‘forced marriages’.

As for the term ‘child-stealing’ it has fallen into desuetude because in this day and age, unlike the days when slavery was accepted, the human being is not capable of ownership and so cannot be the object of theft. Occasionally, however, one hears of case of ‘baby-snatching’. But this is often by woman seeking to compensate for emotional deprivation or for frustrated maternal feelings.

Interest protected. Child kidnapping, whether under sections 352 or 353, is primarily conceived as a crime against the right of child custody; in other words, as a wrong committed against the parents or guardians of the minor. The offence appears aimed at safeguarding the right of custody possessed by a

⁹⁴⁶ Instead of approaching a girl’s father to ask for his daughter’s hand in marriage in the usual way, a young man may carry off or cause to be carried off by some of his peer male friends, the girl he wishes to marry. The girl’s family is later told where she is; her father then consults his kinsmen and matters then proceed in the usual way to finalize the marriage. Alternatively a man may persuade a girl to elope with him. He takes her to his home. A message is then sent to her family. Matters then proceed in the usual way to finalize the marriage. Sometimes, however, the couple will elope to some distant land and live more or less in a state of marriage.

parent or guardian. The focus of the law here is on the fact of removing a minor against the will of its parents or guardians. The will of the minor is immaterial; so that it is no defence for an accused person to aver that the minor consented to the removal. In any event a minor who has not attained the requisite age of majority cannot at law give valid consent. It follows that the basic interest protected under sections 352 and 353 is the power of control exercisable by parents or guardians over minors. Secondly, the law against kidnapping also protects the minor's freedom of movement and even his right to life (for the minor could die in the course of the kidnapping).

Take away, entice away, and procure to leave. The act of kidnapping a minor consists in removing him from the control of his parents or guardians to another place. So long as lawful custody is lost, its duration and how far away the minor is removed are immaterial. The removal must however be effected through one of the ways indicated in the sections, namely, by taking away the minor, or by enticing away the minor, or by procuring the minor to leave.

The prosecution must specify in the charge the precise manner of removal that was employed by the defendant. Taking away implies a physical removal (with or without the kidnappee's consent), as where a person is abducted or captured. Enticing away implies a removal effected by craft or cunning, deception, decoy or subterfuge, or by fraudulent representations. Procuring the minor to leave implies requesting, persuading, blandishing, or cajoling the minor to leave.

The manner in which the taking away, enticing away, or procuring to leave is done is of no moment. If neither force nor fraud was used and the kidnappee is a person under 18 years of age, the charge should be laid under section 352(1). If force or fraud was used and the kidnappee is a person below 21 years of age, the kidnapper should be charged under s. 353. It makes no difference whether the force or fraud was directed at the parents or at the guardians of the minor or on the minor himself or at any other person. It is also immaterial that the kidnapper thought the kidnappee was above 18 years of age.

Cases beyond the reach of the section. Perplexingly, the law is silent in the case where a person above 18 is kidnapped without use of force or fraud, as where such a person is concealed or imprisoned in a house or room where he happens to be. The law is also silent in the case where a person above the age of 21 is forcibly kidnapped. This paradox is the result of the lawmaker's myopic perception of kidnapping as essentially an offence against custody right. Being an offence against custody right the law of kidnapping seems inapplicable in the case where a person has attained the age of legal majority

and thus legally not subject to another's legal custody.

Time factor and distance. Must kidnapping, whether forcible or not, last for a specific period of time, and if so, how long, for the offence to be consummated? And how extensive, if at all, must the asportation be for the crime to be consummated? The sections under consideration are silent on these points. This silence can only mean that the time element and the distance factor are both immaterial. The offence is committed as soon as the minor is removed from the custody of his parents or guardian and against their will. As the law of kidnapping does not require that the kidnapper (or baby-snatcher) should have the intention permanently to deprive the parents or guardians of custody of the minor, even a transient deprivation or the briefest of takings suffices, though of course this is a question of fact for the court to consider in each case. Moreover, provided the parent or guardian of the minor is deprived of the custody of him, it is immaterial that the minor was not spirited away out of the jurisdiction or that he was merely removed to one part of the same city or one part of the same building where the minor lives with his parents or guardians.

Those to whom custody belongs by law or by custom. These are persons who have custody of a minor either under customary law, or statutory law, or by virtue of a court decision. Under statutory law custodial rights and duties over the children of married parents rest with both parents equally and can be exercised independently of the other. Where the parents are unmarried all custodial rights and duties are "jointly exercised by the mother and the father with whom the affiliation was legally established."⁹⁴⁷ In the event of disagreement those rights and duties are to be "exercised by the parent who has the effective custody of the child" unless the judge decides otherwise.⁹⁴⁸ In any proceedings for divorce, nullity or judicial separation, a party may apply for custody of any child of the marriage. The court has power, if both parties are unfit, to grant custodial rights to a third party, or to make a child a ward of court, in which case custody passes from the parents, or any other person with custodial rights and duties, to the court itself. Under statutory law therefore those to whom custody of a child belongs may, depending on the circumstances, be the biological parents, or the custodial parent(s) or guardian(s).

Under customary law custody rests with both parents if they are married. If they are not married, or in the event of divorce, custody goes to the child's father on the reasoning that he is generally the more well-off of the two and, before this was judicially declared repugnant to natural justice equity and good

⁹⁴⁷ Civil Status Registration Ordinance, section 47.

⁹⁴⁸ *Idem*.

conscience, that he had paid dowry on the child's mother. In *Ngeh v. Ngome*⁹⁴⁹ the High Court at Buea held, reversing the decision of the lower court, that the custom of giving the custody of a child to the man who had paid dowry on the child's mother rather than giving custody to the child's biological father was repugnant to natural justice, equity and good conscience, and therefore void. In that case, the respondent, Ngome, and one Paulina Mekong were married under customary law. They lived for ten years without issue. Paulina then ran away. She went to live with the appellant, Ngeh. She had twin sons by him. Ngome file a suit in the Kumba Native Court against Pauline. He prayed the court to declare that the twin boys were his.

The customary law on the subject was clear. If a customary law wife deserts her husband for another man by whom she has children they are deemed to be have been begotten and claimable by the deserted husband, and not by the wife's paramour, so long as the dowry that was paid on the wife had not yet been refunded. In the instant case, Ngeh had not yet refunded the bride price that Ngome had paid on Paulina. The Kumba Native Court therefore had no difficulty in granting Ngome's prayer. Ngeh appealed to the Special Appeals Officer and lost. On further appeal to the High Court of West Cameroon, it was held that the customary law rule upheld by the Kumba Native Court and the Special Appeals Officer was repugnant to natural justice, equity and good conscience and therefore invalid and unenforceable. Ngeh was thus entitled to enjoy fully the parental rights over his biological twin sons.

Sometimes a child is 'given' to or sent to live with a near relative who then becomes his custodial parent.

In the result, the phrase 'those to whom custody belongs by law or by custom' must be taken to refer to persons who are the minor's biological parents or his custodial parents or his guardians. The right to custody, which these persons have over a minor under their charge, includes the right of control. That control subsists when the minor is temporarily away from home, as when he has permission to visit friends or relatives, or to spend vacation with them. Thus, if a girl while living with her father, leaves his house for a mere temporary purpose, intending to return to it, she is still under his control; and if when so out of the house a person induces her to run away with him, he will be guilty of kidnapping.

It is otherwise where a parent or guardian has completely relinquished control over the minor, as where the minor has left the parental home and the parents neither know, nor are even concerned about, the minor's whereabouts. In such a case it is doubtful that an offence of kidnapping the minor is capable of being committed. Since the parents or guardians cannot be bothered there is no will that has been defeated. This in effect means the crime of kidnapping is not capable of being committed in respect of a minor with no one having

⁹⁴⁹ (1962-1964) WCLR 32.

custody over him, such as a foundling, or a 'lost child', or a 'street kid', for example.

There is however no relinquishment of parental authority in the case of a minor in boarding school or living with relatives or family friends. The head of the boarding school, or the relatives or friends concerned, are persons in *loco parentis* (standing in the place of a parent) and the parents are deemed to exercise their control indirectly through those persons.

Kidnapping by parent. Is the crime capable of being committed by a parent against his or her own child? On principle this is possible. Cases are not unknown where one of two spouses who have fallen out spirits away their children. Suppose that a husband and wife are divorced or are judicially separated and the court has granted custody of their child to one of them. If the other parent later takes away the child against the will of the parent to whom the court has granted custody, there is no compelling reason why this should not be kidnapping and why the delinquent parent should not be convicted of the offence. The prosecution may charge such a parent with kidnapping (under the appropriate section of the Code) or with failure to return a minor to the person to whom custody has been granted by a court (section 179), or both offences in the alternative.

Against the will of the person who has legal custody. The removal of the minor must be against the will of the person who has legal custody of him. If that person consented to the minor's removal, the offence is not committed. The question whether or not the person who has custody gave his consent to the removal is a material point. But the question of the minor's consent to his own removal is an irrelevant point. It is therefore not a defence to a charge of kidnapping to argue that the minor solicited the kidnapping or pleaded with or induced the accused to take him away.

A vexed question relates to the removal of a minor while away from home, say, in boarding school or living with friends or relatives. In this case, need the prosecution prove that the removal was against the will both of the person in *loco parentis* and of the person to whom legal custody belongs? It seems not. Proof that the removal was against the will of the latter person suffices.

Punishment. Kidnapping without using fraud or force is punishable by imprisonment for from one to five years and by fine. Where fraud or force was used in carrying out the kidnapping the prescribed penalty is imprisonment for from five to ten years and a fine.

Aggravated kidnapping. A person is guilty of aggravated kidnapping (and is punishable by a mandatory life imprisonment) in any of the following cases: (i)

where the kidnappee⁹⁵⁰ is an under-13; (ii) where the kidnapping was carried out for the purpose of obtaining a ransom; and (iii) where a ransom, whether demanded or offered without any demand made, was actually obtained.

A person is also guilty of aggravated kidnapping, punishable this time by death, where the minor dies in the course of carrying out the kidnapping. The defendant cannot escape being sent to the gallows by arguing that death was unintended or was unforeseeable. The reason is that this is a case of ‘felony murder’, that is to say, death resulting from the intentional commission of a serious offence (usually arson, burglary, kidnapping, rape, robbery). The death penalty here is consistent with the provision of section 276(1) which punishes with death “whoever commits murder ... c) in the ... commission of a felony or misdemeanour.”

Defences. It is a defence to a charge under sections 352 (1) and 353 that the minor was taken away with the consent of its parents or guardians. It is also an answer to a charge under section 352(1) that the accused was misled as to the age of the minor (section 352(1), proviso). The plea is one of mistake as to the age of the victim. It is a credible defence that the minor looked like a person over the age of eighteen or told the defendant that he/she is over the age of eighteen. It is also a good defence that the defendant *bona fides* and reasonably believed the kidnappee to be over eighteen years of age. However, averment by the defendant that he had no means of ascertaining the victim’s age will avail him nothing. The law does not encourage resort to self-help. But there is no reason why the defence of claim of right may not also be successfully set up. *Seem* this is a defence under the general principles of law.

Subsequent marriage between kidnapper and kidnappee. Subsequent marriage between the offender and his victim is a complete defence to a charge of kidnapping under section 352(1)⁹⁵¹, as it is to a charge of rape under section 297. This defence appears to be a concession to the much-castigated customary practice of marriage by elopement or abduction, and constitutes a let-out for many defendants. But it is probably no more than a *locus poenitentiae* (an opportunity of repentance) given by the law to the defendant.

The defence of subsequent marriage will however succeed only where the marriage is a valid one, that is, it satisfies all the conditions relating to matters of form and substance (marital age, consent freely given, publication of bans of marriage, celebration of the marriage, etc). Provided the marriage is not void for one reason or another, it is immaterial what type it is. It may be a statutory

⁹⁵⁰ The baby-snatcher, for example, would be a kidnappee and thus liable to life imprisonment instead of being given help since her conduct is generally associated with subnormality, schizophrenia or personality disorder.

⁹⁵¹ Section 352(2).

or customary marriage, a monogamous marriage, a polygamous marriage or potentially polygamous marriage. But it cannot be a 'same-sex marriage'. The law and common morality of the people of this country do not countenance so-called 'gay marriages'.

The requirement of a valid subsisting marriage means the kidnapper cannot set up as a defence the fact that the victim was taken away only for the purpose of having sexual intercourse and nothing else, or that both are in love with each other, or that both intend to get married very soon, or even that both are engaged. Nothing short of a valid marriage will do. The defence of subsequent marriage is available to a charge under section 352(1) but not to a charge under section 353. However, if a person kidnaps a minor by forced or fraud and subsequently marries the kidnappee it may well be that a prosecution would, for sociological reasons, be ill-advised. Even if charges were pressed the court would in all probability either discharge the offender on the evidence of subsequent marriage to his victim, or impose a token or niggardly penalty by invoking section 92 (mitigating circumstances).

1.7. Failure to return a child

Closely connected with the offence of child kidnapping are two inter-related offences, which may be described as child-harboursing offences. These are, 'failure to surrender a minor' (section 179) which has already been discussed, and 'failure to return a child' (section 355) which will now be discussed.

Section 355 punishes by imprisonment of up to five years and a fine anyone who "being in charge of a child fails to return him to those having the right to claim him back." In order to sustain a conviction under this section the prosecution must prove that the defendant (i) is in charge of a child (ii) has failed to return him (iii) to those having the right to claim him back.

The defendant is in charge of a child. To establish this, the prosecution need only show that the defendant has actual custody (de facto control) of the child. It is immaterial how he came about the de facto control. He may have assumed it under doubtful circumstances. He may have assumed it rightfully or wrongfully. He may even have assumed it for laudable motives. He may, in fact, have been conferred the de facto control legitimately. It matters not. What is of moment is that he is in charge of the child.

The term child is here not defined. This does not facilitate the prosecution's task as it must show that the person who has not been returned is indeed a child. The term 'child' like that of 'minor' is not used in the Code with any consistence in meaning. Sometimes 'child' bears the meaning of a person below 15 years of age (as in section 350); sometimes it bears the meaning of an under-16 (as in section 346); and sometimes it bears the meaning of an under-21 on the reasoning, so it seems, that parental power is

exercisable over a child until he attains the age of 21.

The defendant fails to return the child. The term ‘fail’ was discussed when dealing with the crime of ‘failure to return a minor’ (section 179). What was there said concerning the term ‘fail’ applies with equal force here. However, it is submitted that under section 355 a request for the return of the child must have been made by those entitled to claim him back. It is only after that request has unsuccessfully been made that it can be said that there has been a failure to return the child. Still, the failure to return the child may be due to some compelling factual circumstance as where the child is lying ill in hospital; or where he is away in boarding school or spending holidays with friends or relatives; or, indeed, where a child who has reached years of discretion refuses to be returned to those having the right to claim him back.

It is submitted that cases of this nature are matters of fact, which the court would have to consider on a case-by-case basis. No general principle can be laid down. Nevertheless, it is still an open question whether there can be a ‘constructive return’ of the child as where the child is away or is ill in hospital and his belongings are handed over to those who have the right to claim him back.

Those having the right to claim the child back. These are persons who are entitled either under statutory or customary law, to *de jure* right over the child and therefore to a legal right to claim him back. Here, the right to legal custody of the child flows not from a court order, as under s. 179, but from statutory or customary law. Likely situations are those in which the right to claim the child back is being claimed by parents as against non-parents of the child or strangers, surrogate parent as against putative parent, natural parents as against foster parents, grandparent as against step parent, relatives as against step parents, the child’s maternal/paternal relatives as against the child’s mother/father or paternal/ maternal relatives, natural parents as against relatives or adoptive parents, the child’s natural father as against its maternal grandparents or relatives.

It is well to remember that a customary law ‘right’ to claim a child based on payment or non-payment of dowry was long ago declared to be repugnant to natural justice, equity and good conscience. This is settled jurisprudence in this country.

§2. Offences against the institution of marriage

2.1. Forced marriage

Section 356 creates and punishes two ‘forced-marriage’ offences. The section criminalizes two types of traditional practices that were once quite common: compelling a person to marry against his or her will, and giving in marriage

pre-pubertal children.

Compelling a person to marry. Whoever “compels another to marry” is guilty of an offence under section 356(1) and liable to imprisonment for from five to ten years and a fine. The perpetrator of the offence (that is, the person who did the compelling) could be a male or female person, the victim’s parents or any one of them, or the victim’s guardian or other person in *loco parentis*. The person to whom the victim is compelled to marry is immaterial. It could be the perpetrator himself/herself or a third party. Equally the sex and age of the person compelled are immaterial.

In the ordinary run of cases the victim is a female youth. But the offence is not confined to cases involving persons answering that description as section 356(2) clearly bears out. Cases of adults being compelled to marry are not unknown. Common examples in traditional society are cases of widows/widowers and divorcees who are sometimes compelled by their parents, guardians or relatives to remarry (when they would rather not) or to marry a specific person. Many instances of levirate (widow inheritance), sororate (a woman marrying the husband of her sister, often when the sister cannot have a child and sometimes when the sister is deceased) and marriage by proxy are cases of forced marriages and can be prosecuted under section 356(1).

In order to secure a conviction under the section the prosecution must prove that the victim was compelled to marry. This simply means proving that the marriage was entered into without the victim’s consent at all or that the consent purportedly given was in fact extorted and not free or genuine. Consent is not free or genuine if the person who gave it cannot at law give marital consent⁹⁵² or if it was obtained by duress or threat of it. In such a case the ‘consent’ is invalid at law.

Section 65 of the Civil Status Registration Ordinance forbids the registrar of marriages to celebrate a marriage in respect of which consent was obtained by force. The Ordinance defines ‘force’ as “brutality or ... threats exercised on the person of one of the spouses-to-be, his father, his mother, his legal guardian, his customary head or his children in order to obtain the consent or refusal of such a spouse.” Duress vitiates consent to an otherwise valid marriage; it destroys the reality of consent to ordinary wedlock.

Thus, consent is invalid if the will of a party to the marriage was overborne by genuine and reasonably held fear caused by threat of immediate danger to life, limb or liberty.

Consent obtained by fraud (undue influence, tricks, impersonation, inducement, mistake, misrepresentation) is also invalid. It is however not every

⁹⁵² The minimum marital age is 15 years for females and 18 years for males: s. 52 (1) Civil Status Registration Ordinance, 1981.

mistake that nullifies consent. To have that effect the mistake must be such that the party did not validly consent to the marriage. The mistake must relate to the nature (as distinct from the effect) of the ceremony or the identity (as distinct from the quality or fortune or social status) of the other party.

Section 356(1) contemplates the cases where the parent(s) (or guardians or other persons in *loco parentis*) of the victim or the other party to the marriage, is the source and agent of the compulsion. However, mere persuasion, coaxing, cajoling or importuning is not compulsion.

Marriage. The other ingredient of the offence that the prosecution must also prove is the fact of marriage. It must be shown that there was a proper marriage on the face of it, albeit that it was procured by force and therefore on principle void. There must have been a ‘valid’ customary or statutory marriage. If the marriage was invalid because of non-fulfilment of a requirement relating to a matter of form or substance, the parties having gone through a ceremony of marriage, an attempt could lie on the part of the person who did the compelling. If the marriage turns out to be a sham or putative marriage then an attempt could also lie. But no offence is committed if as a result of the compulsion there was a mere engagement or mere living together, although here too an attempt could possibly lie.

Interest protected. The interest protected here is the integrity of marriage in view of the now universally accepted principle that “marriage shall be entered into only with the free and full consent of the intending spouses.”⁹⁵³

The underlying assumption of the principle is that there cannot be conjugal felicity in a marriage entered into by force or fraud. Under the marriage law of this country, however, while the consent of the intending spouses of full age must be free, it need not be full. For a marriage to be valid it is not sufficient that the free consent be that of the intending spouses only. The consent of the parents of the intending spouses is also necessary. By section 64(2) of the Civil Status Registration Ordinance, “the consent of a spouse-to-be shall be valid only when supported by that of his father or mother.” In default of parental consent that of the guardian or customary authority suffices.⁹⁵⁴

The plain meaning of section 64(2) is that the consent of the would-be spouses is subordinated to that of their parents, and it makes no difference that the intending spouses are adults. This is perplexing and unwholesome as it in effect puts the power of ‘marital veto’ into the hands of parents. This result cannot be avoided by claiming that between the stipulated legal ages for

⁹⁵³ Universal Declaration of Human Rights, Article 16 (2).

⁹⁵⁴ Civil Status Registration Ordinance, section 64(3)(4).

marriage (15 for females and 18 for males) and the age of 21, persons of either sex may marry with the consent of parents and guardians; and that after the age of 21 they can marry without parental consent. The Ordinance does not say so. Section 64(2) is plain and clear. Subject to presidential waiver a marriage by a person below the relevant stipulated age is void. A person who has attained the relevant marital age may lawfully get married provided that apart from the would-be spouse's consent parental consent is also forthcoming.

Section 64(2) of the Ordinance is not at variance with section 356(1) of the Code. The latter provision makes it an offence to compel anyone to marry. It does not criminalize refusing anyone from marrying. The offence is consummated when the parties go through a ceremony of marriage (statutory or customary law marriage) and it makes no difference that the victim has not filed any petition in the civil court for a decree of nullity of the marriage.

Giving a child in marriage. This offence hits the practice of child marriage as well as that of child betrothal. The legal effect of the criminalization of these practices is that it is an absolute bar to betroth (the first formal step to getting married) or to marry off an under-16 boy or an under-14 girl. Most likely to be caught by this prohibition are those parents or guardians or other relatives who are too much in a hurry to see their children or wards married. Section 356(3) talks of 'marriage', but this does not mean the prosecution has to prove that a valid marriage was entered into with the under-16 boy or the under-14 girl. No male or female who has not reached the required marital age can contract a valid marriage, unless for serious reasons a presidential waiver has been granted. Therefore all the prosecution need prove is that the child was given in marriage; in other words, that the child went through a ceremony of marriage with an adult (the usual case) or even with another child. In the eyes of the law such a 'marriage' is a mere sham or putative marriage, and is null and void on grounds of public policy (in this case, want of marital capacity).

Under section 356(3) the cut off age is 16 years for boys and 14 years for girls. It follows that no offence under the provision is committed where the boy given in marriage is 17 years or the girl given in marriage is 14 ½ years, of age. And yet by section 52 of the Civil Status Registration Ordinance no girl who is below 15 years of age and no boy who is below 18 years of age can contract a valid marriage. The answer to this apparent contradiction in the law is that although it is not an offence to give in marriage a 16½ or 17 years' old boy, or a 14½ years' old girl such a marriage, in the absence of a presidential waiver, would undoubtedly be a sham marriage in the eyes of the civil law and void for want of marital capacity.

Punishment. Each of the two offences under section 356 is punishable by imprisonment for from 5 to 10 years and a stiff fine. This heavy penalty is reflective of the degree of abhorrence, by the lawmaker, of what may be characterized as slavery-like practices. Where the victim of either crime is an under-18 (as is necessarily the case for an offence under sub-section (3) of section 356) the court cannot, even upon a finding of mitigating circumstances under section 92 of the Code, sentence the offender to less than two years' imprisonment. Apart from the custodial and pecuniary sentences the court must pass, the court may additionally deprive the offender of parental power and disqualify him for up to five year from guardianship of any person.

2.2. Abuse in respect of bride price

Section 357 does not outlaw the institution of bride price (also known as dowry, marriage consideration, bride wealth). Nor does it penalize mere giving or receiving of bride price. People in this country, educated or un-educated, male and female alike do not have a negative view of the institution of bride price. The sociological reality, however, is that the institution is often abused. The law has therefore stepped in to regulate it. In doing so the law realistically sets itself the modest objective of attacking those aspects of bride price that give the institution the colour of 'bride sale' and thus a slavery-like practice. The lawmaker has deployed both the civil law and the criminal law for the purpose of achieving this objective. Civilly, bride price has been robbed of its legal significance as an essential condition for the validity of marriage at customary law, and as decisive on the issue of paternity or affiliation of a child under that law.⁹⁵⁵ It is an offence to demand 'excessive' bride price or to receive bride price under circumstances akin to false pretences. Section 357(1) of the Code creates and punishes six distinct offences relating to abuse in respect of bride price.

Receiving a bride price from a third party for the promise in marriage of a married or engaged woman. It is an offence for anyone to receive from a third party the whole or any part of a bride price for the promise in marriage of a woman already married or bound by a betrothal not yet broken off (section 357(1)(a)). The third party from whom the bride price or part thereof is received may be the suitor himself or anybody else such as the suitor's parents, guardians or relatives. Furthermore, the receiver of the bride price (that is, the offender) need not necessarily be the woman's father or her mother or both parents, but could be a guardian or relative, male or female. The bride price must however have been received for the specific purpose of promising to marry off a woman already married or bound by a betrothal not yet broken off. The prosecution must therefore prove that a woman was

⁹⁵⁵ Sections 70 and 72, Civil Status Registration Ordinance, 1981; *Ngeh v. Ngame* (1962).

promised in marriage, and that the woman in question was already married or betrothed to someone. The system of law under which the woman is married or betrothed is of no moment. The word 'woman' here does not have the signification of an adult female person but means any female person of legally marriageable age.

Receiving a bride price before refund of a bride price paid by an earlier suitor. A person is guilty of an offence if he receives the whole or any part of a bride price before refund to any earlier suitor of any bride price he may have paid (s. 357 (1)(b)). This provision does not punish the receipt per se of bride price from a latter suitor in respect of the same bride-to-be. The conduct punishable under this provision is that which consists in receiving bride price without having refunded to an earlier suitor any bride price he may have paid for the same would-be bride. The refund of the earlier bride price must come before the receipt of the subsequent bride price, in respect of the same woman. The offence is thus consummated as soon as there is receipt before refund. A refund after receipt is a mere *repenti actif* (belated regret) and in no way nullifies or even abates the offence. Where no refund at all is made the bride price becomes an unjust enrichment calling for restitution. The prosecution in such a case may lay a charge under section 357(1)(c), which punishes receiving a bride price without any right to it, or under section 318(1)(c), which punishes causing loss to another by false pretences.

Receiving a bride price without any right to it. Anyone who receives, without any right to it, the whole or any part of a bride price for the marriage of a woman, is guilty of an offence (section 357(1)(c)). The essence of this offence is that the receiver of the bride price had no right to receive it. If he had a right to receive it then he has a good defence. It is thus a credible defence against a charge under the provision if the defendant *bona fides* and on reasonable grounds believed that he was entitled to receive the bride price. Under customary law there is a specific person who is entitled to receive bride price. Generally, it is the head of the extended family that receives it. The family head is a person so designated under customary law. The family head receives the bride price, but he does not keep all of it for himself. He distributes it to all the persons who under customary law are entitled to a part of the bride price. As a rule, the woman's biological father and mother (or other persons in their stead) receive specific property that must be part of the bride price.

Demanding an excessive bride price. It is also an offence to demand the whole or any part of an "excessive bride price for the marriage of a girl over 21 years of age or of a widow or of a divorced woman" (section 357(1)(d)).

Reading these words in their ordinary significance, it is clear that it is not the giving of bride price but the demand of an excessive bride price that is here punishable. The demand of the excessive bride price must have been made for the marriage of a girl over 21 years of age or of a widow or divorced woman. It is not an offence as such to voluntarily give an 'excessive bride price'. Nor is it an offence to demand an 'excessive bride price' for a girl who is below 21 years of age but of marriageable age. Nor again is it an offence to demand an 'excessive bride price' for an adult woman who is neither a widow nor a divorcee. What constitutes an 'excessive bride price' must be a matter of fact to be determined by the court from the circumstances of each case. One person's excessive bride price may be another's normal bride price.

Obstructing the marriage of a girl of marriageable age. It is an offence to obstruct the marriage of a girl of marriageable age but below 21 years of age on the ground that an excessive demand for bride price was not complied with (section 357(1)(e)). The obstruction of the marriage must have been for no reason other than that the excessive bride price demanded was not paid. It may not be easy to prove this element of the offence because more often than not legitimate reasons are likely to be invoked for obstructing the marriage by say withholding parental consent or raising objections to the celebration of the marriage or preventing the girl from leaving the house on the day of the marriage. Besides, there is no objective test for determining what amounts to 'excessive' bride price.

Receipt by an heir of a bride price that was promised to the deceased intestate. An heir commits an offence if he receives any bride price that was promised to the person from whom he inherits (section 357(1)(f)). The promise to pay bride price must have been made to the person from whom the defendant inherits. Since bride price per se has not been outlawed paying it or promising to pay it or receiving it is not an offence. What the law punishes is certain aspects of the institution such as demanding excessive bride price, receiving bride price in respect of a woman already married or engaged, receiving bride price when the receiver has no right to it. In the instant case therefore the prosecution would need, in order to secure a conviction, to go further and show that the woman concerned is already married or engaged, or that there was no prior refund of bride price paid by an early suitor for the same woman, or that the deceased (and thus the inheritor) had no right to the bride price.

Punishment. The prescribed penalty for an offence under section 357(1) is imprisonment for from 1 to 5 years and/or a fine⁹⁵⁶.

⁹⁵⁶ From 5 000 to 500 000 francs.

2.3. *Desertion*

By s. 358 (1), “any spouse or parent who without just cause evades ... his ... obligations towards his spouse or children” is guilty of a misdemeanour. Upon conviction of a spouse or parent or guardian or person responsible by custom the court is empowered by section 358(4) to order the forfeitures described in section 30, to disqualify the offender for a period of five years from being guardian or curator of the child, and deprive him for the same period of parental power in respect of any one or more of his children.

Meaning of terms. The offence of ‘*desertion*’ does not mean leaving a place. It consists in evading one’s obligations towards one’s spouse or child or ward. Absconding from or leaving a place would be only a method of evading the said obligations. Only a spouse, a parent, a guardian, or a person responsible by custom is capable of committing the offence. ‘*Spouse*’ means a husband or a wife, whether of a statutory or customary type of marriage and whether of a monogamous or a polygamous form of marriage. A ‘*parent*’ is a father or mother, whether single, married, divorced or widowed. It follows that spouses of a monogamous marriage and those of a polygamous marriage, parents of legitimate and those of illegitimate children, fall within the terms of the provision. It also follows that the meaning of the term ‘*children*’ cannot be confined to legitimate children but must include adopted and illegitimate children since the section talks of ‘*desertion of the family home or otherwise*’.⁹⁵⁷ A ‘*person responsible by custom*’ is one who has custody of a child under customary law and this is usually a paternal or maternal relative of the child.

Obligations. The obligations evaded must be moral, or material or both. These are obligations flowing from the status of spouse, parent or guardian. Marital obligations of spouses towards each other (‘*consortium*’, in the language of family law) include: the duty to be faithful, the duty to provide care and maintenance, the duty to cohabit and the duty to contribute to the cost of running the family home. Parental and guardianship obligations towards the child comprise care and protection, maintenance and education. These basic moral and material obligations are by and large the same encountered as legal obligations under customary and statutory law.

Evasion. The law is indifferent as to how a particular moral or material obligation is evaded. Desertion of the family home is mentioned in the section. But that is only one method of evading an obligation. Cessation of

⁹⁵⁷ Under statutory law, a father is entitled to recognize any child of his born out of wedlock (including adulterine children) and to exercise parental power over the child jointly with the child’s mother: sections 41-47, Civil Status Registration Ordinance, 1981.

cohabitation, which occurs when a party abandons the family home and is living separately and apart, is the commonest but by no means the only method of evading obligations. Desertion can also be constructive as where the parties though living under the same roof cease to be one household and become two households; in other words, the common life and the common home have altogether ceased to exist. In either case the spouse in desertion is guilty of evading his obligations towards the deserted spouse. The spouse will additionally be guilty of evading obligations towards any child of the marriage if he/she is also a parent and fails to contribute towards the care, protection, maintenance and education of the said child. The obligation need not have been wholly evaded. The offence is committed even if only part of the obligation is evaded.

Defence. It is a credible defence that the evasion was with just cause. It is clear that a spouse, parent or guardian who has good cause for not honouring his obligation is not guilty of desertion. Conduct which will suffice as ‘just cause’ clearly include cases of cruelty to the other spouse, removal of child to an unknown destination out of or within the jurisdiction, mental illness, physical illness, imprisonment, the demands of business, requirement to serve in the army, unemployment, poverty, and so on. Since the requisite mental element for the commission of desertion is intention, the offence is not committed in the case of mere gross neglect or chronic discord. Where a spouse alone has been deserted no prosecution may be commenced unless upon complaint by the deserted spouse (s. 358 (2)). The absence of such a complaint is thus a good defence to a charge alleging that the defendant has evaded his/her obligations towards the other spouse.

Instigating desertion. Section 358(5) catches the parent or guardian who instigates his/her married daughter to desert her marital home. The instigator’s purpose is usually to get a hike on the bride price already paid or to get another suitor who would pay bride price yet again for the same woman. Conduct such as this amounts to treating the woman as a source of wealth, a prized possession. Where a wife is guilty of desertion within the meaning of s. 358 and it is shown that the receiver of the bride price (parent, family head or some such person entitled to receive the bride price) instigated the desertion, the instigator is guilty of accessoryship and punishable by imprisonment for from 3 months to 1 year and with fine. The principal offender incurs the same penalty of imprisonment as the accessory. But the pecuniary penalty he incurs is in the alternative to the custodial penalty, while that incurred by the accessory is cumulative to the custodial penalty.

Time when a party is in desertion. The section is silent on the point in time

at which it can be said that a party who evades his obligation is in desertion. It is submitted that on principle it is the moment when the defendant formed the *animus deserendi* (the intention of deserting), and that moment is to be determined by the surrounding circumstances elicited by the evidence.

2.4. Bigamy

Meaning. The dictionary meaning of bigamy is that it is the act of contracting a second ‘marriage’ while the first is still valid. Put in another way bigamy is the fact of having a plurality of ‘wives’ at the same time; that is, being polygamously married. This is not the meaning assigned to that term in the Code. Polygamy is legal in this country.

The term ‘bigamy’ in section 359 thus has a rather debased, if not unorthodox meaning. There, the term means having a plurality of ‘wives’ at the same time, the man having contracted a monogamous marriage with each of the ‘wives’ or contracted a monogamous marriage with one of them and a polygamous marriage with the others.

Historical. The crime of bigamy under section 359 is a cross between Western law and customary law, and, as in all cases of cross-fertilization the product is a crossbreed, a mongrel offence that also catches polyandry. In England, bigamy is an ancient offence. It was a capital crime and was originally of ecclesiastical cognizance only. The canonists understood bigamy as consisting in marrying two virgins successively one after the death of the other, or in once marrying a widow. This bizarre understanding of bigamy probably had something to do with sexual intercourse. It was perhaps deemed unseemly to deflower as many as two virgins or to have sexual intercourse with a widow, under cover of marriage.

Rationale. It is sometimes said that the rationale for punishing bigamy is that it is an abuse of the legal institution of marriage and the principle of monogamy. This might be a plausible justification in societies where marriage means ‘one man, one wife’ to the exclusion of all others. In this country, however, monogamous and polygamous marriages are accepted as part of the fabric of our society and are equally valid. The rationale for the prohibition of ‘bigamy’ would thus appear to be that it is something analogous to public nuisance.

In the eyes of not a few people bigamy is an affront to and a fraud on the public ceremony of marriage and undermines confidence in it. It throws the legal obligations of parties into confusion. It injures the party whom the defendant purports to marry, in cases where that party was unaware that the defendant is married at all or is already married under another form. More importantly, ‘bigamy’ introduces confusion and havoc in the family. It is

therefore perceived as a crime not only against the individual but particularly against the family and more especially against a state-sanctioned solemn public ceremony creating status.

Three head of bigamy offences. Section 359(1) creates three offences, each of which is capable of being committed by a man or a woman. Although it is not so stated *expressis verbis* (in express terms) in the section, it is clear that polyandry is caught within its terms. Any male or female person who (i) being polygamous contracts a monogamous marriage (section 359(1)(a)), or (ii) being monogamous contracts a polygamous or another monogamous marriage (section 359(1)(b)), or (iii) being married under the codified law contracts another marriage (section 359(1)(c), is guilty of bigamy if the previous marriage is still subsisting. Each of these offences is punishable by imprisonment for from 2 months to 2 years and a fine.

Polygamist who ‘contracts’ a monogamous marriage. This is a legal impossibility. A person who is polygamously married cannot contract a valid monogamous marriage. He may go through the ceremony of such a marriage but in the eyes of the law the purported marriage is a sham and a complete nullity.

To support a charge under this head the prosecution must prove that the defendant is a polygamist, that he later ‘contracted’ a monogamous marriage (i.e., went through the ceremony of such a marriage), and that all his previous marriages had not been dissolved at the time of the purported monogamous marriage. A polygamist is a man who is polygamously married, that is, he is validly married to more than one woman. It makes no difference that the women were married successively over a period of time or that all of them were married together at one marriage ceremony. Further, a marriage is polygamous not only where a man has at the relevant time more than one wife. At law a polygamous marriage includes a potentially polygamous marriage, that is, one in which a man has, at the relevant time, only one wife, but a marriage in which he is legally capable of taking another wife even though the marriage may have been intended by the parties to be, and subsequently remained, in fact, monogamous.

The prosecution must tender at least *prima facie* (at first sight) evidence of a lawful polygamous marriage. If it is claimed that the polygamous marriage was contracted abroad in Europe or America, clearly the claimed marriage cannot be lawful since a valid polygamous marriage cannot be entered into (as distinct from the recognition of such a marriage) in those places. Further, if the man is cohabiting with concubines or is betrothed to two or more women there is no polygamous marriage. People sometimes speak of ‘serial polygamy’. That folk phrase refers to a man who habitually marries and divorces, so that over a

period of time he would have lawfully wedded a plurality of wives, even though each marriage contracted was monogamous. The so-called serial polygamist commits no offence and is beyond the reach of section 359.

The prosecution must go on to show that the defendant went through a valid monogamous ceremony of marriage. Provided he remains within the regime of polygamy, a polygamist can always lawfully take another wife. So when section 359 says he 'contracts a monogamous marriage' this must be understood to mean that he falsely declared to the registrar of marriages that he is single, in which case he deceived both that public officer and the woman with reference to a matter of public concern. This deceit can easily be proved, by producing the original (or a certified copy) of the marriage certificate. The entry 'monogamous' would have been made in the appropriate place on the certificate, and if that space is left blank this may be an indication of an intention to deceive or mislead. The law requires the registrar of marriages to specify in the marriage certificate the type of marriage (polygamous or monogamous) entered into by the parties.

The monogamous 'marriage' must on the face of it be valid in all other respects (marital age, consent, degrees of consanguinity and affinity, etc.). However, the fraudulent misrepresentation as to the type of marriage taints the 'monogamous marriage' with illegality and renders it void *ab initio* (from the start) on grounds of public policy. The law is not altered by the fact that the purported monogamous marriage was contracted with one of several wives already polygamously married to the defendant. The law is also not altered by the fact that the woman involved in the purported monogamous marriage is the man's only wife in a potentially polygamous marriage. The law requires dissolution of a polygamous or potentially polygamous type of marriage before a monogamous type of marriage can be validly contracted, and vice versa.

Finally, the prosecution must prove that the purported monogamous marriage was contracted 'before the dissolution of all previous marriages'. A monogamous marriage is dissolved by death of one of the parties, by divorce, or by nullification by a court of competent jurisdiction. In the case of a polygamous marriage the death of the husband dissolves the marriage in regard to all his wives; but the death or divorce or nullification of the marriage of one wife does not dissolve the marriage entered into with the man by each of the other wives.

Monogamist who contracts a polygamous marriage or another monogamous marriage. A man who is married to one wife at a time is said to be a monogamist or a monogamously married person. Such a person is bound by an undertaking of monogamy. In the case of a civil marriage the source of that binding undertaking is the law; and in the case of a valid marriage celebrated in *facie ecclesiae* (that is, celebrated by an episcopally

ordained priest, a clergyman in holy orders of any Christian church) the source of the binding undertaking is the Holy Bible. Where a person so bound subsequently contracts any marriage, whether monogamous or polygamous, before dissolution of the previous monogamous marriage, he can be properly convicted of bigamy within the meaning of section 359(1)(b).

But the prosecution must prove that the first marriage is a marriage in fact, that it is a monogamous marriage, and that it was a valid subsisting marriage at the time of the second marriage. It must be shown that the first marriage was not void *ab initio* (e.g., because the parties were related to each other within the prohibited degrees of consanguinity and affinity, or are of the same sex, or are under marital age); that it had not, at the time of the second 'marriage' been dissolved or declared void by a court of competent jurisdiction; and that it had not been terminated by death of one of the parties.

The crime is committed the moment the monogamist purported to have contracted the second marriage by going through the necessary marriage ceremony. To avoid a result in construction that would be manifestly absurd, the words 'contracts any marriage' in the section are to be read as though they were 'goes through the form and ceremony of marriage'. The form and ceremony gone through must be such as is known to and recognized by the law (statutory or customary) as capable of producing a valid marriage. In other words the form of marriage the monogamist and the second consort went through must be one which, but for the existence of the impediment of the subsisting marriage contracted earlier, would have been recognized as a marriage valid in form by the system of law under whose forms it was celebrated.

Person married under the received law and contracting another marriage. The position here is basically the same as that under section 359(1)(b) just discussed. This is so because a marriage under the received law is necessarily monogamous. The provision is therefore probably redundant. Its only utility is perhaps to serve as a reminder to persons who marry abroad under Western law that they cannot, on their return home, contract another marriage under customary law or even under statute without that the first marriage has been terminated whether by death, divorce, or nullification by a court of competent jurisdiction.

Defences. Since section 359 uses the term 'marriage' it is a good defence that the 'marriage' in question was not a marriage at all but, say, a sham marriage, a pretended marriage, or a mere betrothal. It is also a good defence to show that the marriage, first or second, was void *ab initio*; or that it had been dissolved or declared void by a court of competent jurisdiction (in which case the onus is on the defendant to prove termination of the marriage); or (regarding a

monogamous marriage) that the other spouse had been absent for a period of seven years and had not been heard of by the defendant as being alive within that time. Honest and reasonable belief of the death of the other spouse (in a monogamous marriage) is a credible defence. So too is an honest belief on reasonable grounds as to the invalidity of the previous marriage.

A question of morals or a question of form? Since polygamy is part of the fabric of this society and is also a legally accepted institution the purpose of the law of bigamy in this country must be less about morals. It is submitted that it has more to do with the matter of form. Section 359 punishes anyone who contracts a ‘marriage’ under one form of marriage while a ‘marriage’ earlier contracted under another form of marriage is still subsisting. This prohibition is seemingly predicated on the fact that although polygamy and monogamy are both valid forms of marriage, one cannot at one and the same time be both a polygamist and a monogamist.⁹⁵⁸ This creates confusion with regards to marital rights and obligations, and other incidence of marriage.

Same-sex ‘marriages’. The law of this country neither recognizes nor allows so-called same-sex marriages.⁹⁵⁹ If two persons of the same sex go through a ceremony of marriage, the purported marriage is void *ab initio* for want of an essential requirement of substance, namely, that the parties to a valid marriage

⁹⁵⁸ Not even when one were to consider the husband-wife relationship as a bilateral one so that a polygamous marriage is regarded in effect as a series of bilateral unions with one common or shared partner. This cannot be because it is a contradiction in terms to say that a man and a woman are married monogamously when in fact the husband is validly married to two or more women at the same time.

⁹⁵⁹ The UK also does not recognize ‘same-sex marriages’. Recently, two lesbian university professors, Sue Wilkinson, 52, and Celia Kitzinger, 49, who got ‘married’ in Canada in 2003 returned to England and petitioned the Family Division of the High Court to have their lesbian marriage recognized. The Court dismissed the claim and awarded £25,000 costs to the government. Sir Mark Potter, President of the Family Division declared that marriage was, by long-standing definition and acceptance, a formal relationship between a man and a woman primarily designed for producing and rearing children. The European Convention on Human Rights protects the institution of marriage, and “to accord the same-sex relationship the title and status of marriage would be to fly in the face of the Convention as well as to fail to recognize physical reality.” He went on: “It is apparent that the majority of people, or at least of governments, not only in England but Europe-wide, regard marriage as an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit.” In this, “both maternal and paternal influences are available in respect of their nurture and upbringing. ... The belief that [a heterosexual] relationship is the one which best encourages stability in a well-regulated society is not a disreputable or outmoded notion based upon ideas of exclusivity, marginalisation, disapproval or discrimination against homosexuals.” See, *The Guardian*, Tuesday August 1, 2006, p. 12. So far only Belgium, Canada, Holland, the US state of Massachusetts, and South Africa recognize ‘same-sex marriages’.

must be of opposite sex. If a man undergoes a sex change procedure to make him a 'woman' and then goes through a ceremony of marriage with another man the married would still be void. In the eyes and wisdom of the law he still remains a man. The fact that he now has an artificial vagina does not alter his gender, which is determined at birth and not thereafter at the whims and caprices of the individual as he goes through life.

Parties to the so-called same-sex 'marriage' can in fact be prosecuted for attempted homosexuality or private indecency. The fact of going through that ceremony of marriage is the performance of an act towards the commission of indecency or homosexuality unambiguously indicating an irrevocable intention to commit either offence. Bizarrely, however, since a so-called same-sex marriage is void *ab initio*, a monogamously married spouse can covertly carry on a 'marital' relationship with a person of the same sex and would not have to reckon with section 359, though such conduct would definitely ground a petition for divorce on the fact of 'cruelty' or 'behaviour' on the part of the respondent.

Accessory. Where a person is charged with bigamy the consort with whom the other marriage was contracted can be charged with abetting the commission of the offence. The charge for aiding and assisting will however stand only if the person charged with complicity knew of the previous marriage.

2.5. Incest

Incest within the meaning of s.360 is intentional sexual intercourse by a male or female person with any legitimate or natural ascendant or descendant in the direct line without limit of degree; or with a brother or sister, whether legitimate or natural, and whether of the whole or of the half blood.

Historical. Incest is almost a universally recognized taboo. However, the range of persons covered by the sexual prohibition varies from society to society. In the Christian world the prohibition generally follows the Levitical degrees of kindred.⁹⁶⁰ But in ancient Egypt, Peru and Hawaii, members of the royal family were obliged to contract incestuous marriages to ensure that the throne remained within the royal family. It would appear that in the Indonesian island of Bali it is not incest for identical twins to marry. The justification for this toleration is the extraordinary belief that identical twins are completely intimate *in utero*. In traditional African society the incest prohibition

⁹⁶⁰ On immoral sexual relations condemned by the Bible as incestuous, see Leviticus 18 and 20. Biblically, it is incest to marry a near relative (Lv 18: 6). It is also incest for a man to have sexual intercourse with his father's wife or wives (Lv 20: 11; Dt 27: 20), with his father's widow (Dt 22: 30, or with his half-sister or his daughter-in-law (Ez 22: 11).

covers persons within the degrees of consanguinity, affinity, and adoptive relationship. The fear of committing incest by marrying a blood relation explains the absence of a general practice of endogamy in Africa. That fear is also the basis of the rule of exogamy, which enjoins persons to seek their spouses outside their own family groups.

Rationale. Incest is prohibited because of its claimed harmful effect on the family, which is the very kernel of the social complex from which outgoing relationships are developed with others in society. Incestuous relationships disorganise the family relationships themselves, produce tension within the family and lead to a confusion of roles. Fear that incest may destroy the family, the basic unit on which society is built, accounts for the constancy of the incest taboo. The incest taboo in Africa is aimed at avoiding confusion in sentiments, which could weaken family solidarity and create a mixture of blood, which could lead to genetic disorders. The existence of the taboo does not however mean absence of incest in African societies. There are many documented cases of father-daughter incest in some African communities.

While the incest taboo is probably as ancient as when man started living in organised society its criminalisation is comparatively recent. In England, for example, it was not a crime until 1908. In France there is no specific incest offence. The conduct is punished as a mere indecent assault. In this country it was not until 1967 that incest was criminalised.

In terms of section 360, incest is committed only between persons who are blood relations. This would suggest that the existence of the crime is based on biological considerations (to prevent the procreation of abnormal offspring) and not on the protection of any moral sentiments in the community regarding sexual relationships between family members.

In order to secure a conviction under the section the prosecution must prove, besides the element of intention, that the defendant had sexual intercourse with a blood relation within the specified prohibited degrees of consanguinity.

Sexual intercourse. There must be actual sexual intercourse between the two parties concerned. This means there must be penile-vaginal penetration, however slight, but an emission of semen is not necessary. Proof of lesser acts of sexual gratification (e.g., heavy petting, kissing, fellatio, mutual masturbation, fingering) will not do. But such acts could be prosecuted as attempted incest if it can be proved that the lack of penetration was due to circumstances independent of the defendant's will.

However, if the parties intended only acts of sexual gratification short of penile-vaginal penetration the crime of incest would not have been committed although that does not mean that the parties may not be guilty of some other

offence, such as indecency. The use of the phrase ‘sexual intercourse’ rather than ‘sexual relations’ imports the idea of penile-vaginal penetration and means that the offence is in principle not committed in the case of intercourse *per anum* (i.e. through the rectum, as in the case of buggery or sodomy) or in the case of acts of homosexuality or lesbianism.

But such conduct may amount to ‘incestuous indecency’ punishable by imprisonment for from 10 to 15 years where the victim is a child⁹⁶¹ under the age of 16, or by imprisonment for from 1 year to 5 years where the victim is over 16 but under 21 years of age. This conclusion follows from the rider with which section 360 opens. In the result, incestuous homosexuality/lesbianism and incestuous sexual indecency in private between consenting adults are not offences under the Code. This attitude of the law is a clear indication that the crime of incest in this country is based on biological considerations and not on moral sentiments. There is no risk of procreation in incestuous homosexuality and indecency.

Proof of mutual consent is required to constitute incest. The section does not say so specifically. But it must be understood as the intention of the legislator that consent is necessary. Since mutual consent is required, it is no ground of defence that the other party consented. The requirement of mutual consent makes both parties equally guilty of the crime as perpetrators; neither of them can claim to be a mere victim or an accessory. If the other party did not consent to sexual intercourse then incestuous rape would have been committed. The conduct though not specifically characterized as such in the Code is a felony punishable by life imprisonment⁹⁶² where the victim is an under-16, or by imprisonment for from 10 to 20 years⁹⁶³ where the victim is over 16 but below 21 years of age.

This also follows from the rider with which section 360 opens. The rider makes cross-reference to sections 346(3) and 347(1). Under section 346(3) the person who has ‘consensual’ sexual intercourse with an under-16 child is liable to imprisonment for from 10 to 15 years. Since consent is no defence to a charge of incest the cross-reference to that provision seems otiose, and in terms of punishment the penalty in that provision is comparatively more lenient than that under section 346(4), which pointedly contemplates incestuous rape and prescribes a mandatory life sentence for the conduct. It is submitted that the cross-reference to section 346(3) was in error and that section 346(4) must be taken to be the cross-reference that the lawmaker had

⁹⁶¹ In indecency cases the party who is an under-16 is always deemed a victim because a child cannot at law give valid consent. Moreover, an under-18 is below the age of full criminal responsibility. Where the parties are both under the age of 16 years their responsibility will be diminished as per section 80(3) of the Code.

⁹⁶² Section 346(4) as read with section 298(a).

⁹⁶³ Section 347(1) as read with section 296.

in mind.

We are then left with the case of the incestuous rape of an adult. This is punishable only where the perpetrator is a person who has authority over the victim or custody of the victim by law or by custom (section 298(a)). Usually, such a person would be a parent or other blood relation (grand parent, brother, sister, uncle, aunt, cousin). The prescribed penalty is imprisonment for from 10 to 20 years (sections 296 and 298(a)). If the perpetrator though a blood relation is a person who has no custody of or authority over the victim the prosecutor would do well to ignore the incestuous circumstances surrounding the rape and lay the charge under section 296.

As earlier observed the crime of incest can be committed only by actual sexual intercourse between the parties.

Accordingly, the bare fact of marriage *per se* between the parties (i.e. going through a ceremony of marriage), without evidence of actual sexual intercourse between them (i.e. consummation of the marriage) is not a sufficient *actus reus* of incest, whatever the speculation might be that given the marriage incest may have been committed. The mere celebration of a marriage or the mere existence of a putative marriage or mere engagement or cohabitation does not constitute the offence. But conduct such as any of these, including the fact that a child was born of the union, would afford very strong and persuasive evidence from which the court may draw an inference of sexual intercourse if no evidence to the contrary is forthcoming.

Section 360(2) empowers the state to commence prosecution for incest *proprio motu*, without the prior complaint of a blood relation in case of 'notorious concubinage' or of 'incestuous marriage'. The notoriety of the concubinage or the incestuous nature of the marriage is only of evidentiary value in proving the fact that sexual intercourse did take place. Therefore, when incest is charged, it is not sufficient for the prosecution simply to prove the fact of incestuous concubinage or incestuous marriage, as the case may be. The legal burden of proving actual sexual intercourse still has to be discharged. But proof of sexual intercourse is more often than not by inferential or circumstantial evidence rather than by direct evidence. Upon proof of the notorious concubinage or incestuous marriage, as the case may be, the prosecution may invite the court to draw inference of sexual intercourse from the facts elicited in evidence. The evidential burden will then shift to the defendants to satisfy the court, on a preponderance of evidence, that despite the concubinage or marriage the parties have never had sexual intercourse with each other, for example because of physical impossibility. The prosecution's case would have been made out if the defendants fail to discharge this evidential burden.

Prohibited degrees of consanguinity. Incest is capable of being committed only by persons who are related by blood. Therefore, after proving that actual sexual intercourse took place between the parties, the prosecution must go further and show that the parties are related within the prohibited degrees of consanguinity specified in section 360. That section confines the crime of incest to sexual intercourse with “any legitimate or natural ascendant or descendant in the direct line without limit of degree; or [with a]... brother or sister, whether legitimate or natural, and whether of the whole or of the half blood.” In *The People v. Sylvester Wirsungrin & Alice Kumeka* (1982)⁹⁶⁴ the marriage between the respondents was characterized as incestuous because both were said to be ‘descendants of one family’.

The crime is thus confined to sexual intercourse between persons related by blood. It does not extend to sexual intercourse between persons related through affinity or adoption. Reuben had sexual intercourse with Bilhah, his father’s concubine.⁹⁶⁵ A charge of incest against the two under section 360 would fail for lack of consanguineous relationship between them. Affinity exists between a husband and the blood relations of his wife, or between a wife and the blood relations of her husband. It is not incest under section 360 for a husband to have sexual intercourse with any blood relation of his wife, or vice versa. Moreover, there being no blood relationship between the blood relations of the one spouse and the blood relations of the other spouse, sexual intercourse between a blood relation of one spouse and a blood relation of the other spouse is not incest.

It follows that sexual intercourse say between a man and his sister-in-law, between a woman and her brother-in-law, between a brother-in-law and a sister-in-law, between a man and his mother-in-law or daughter-in-law, between a woman and her father-in-law or son-in-law, does not amount to incest within the meaning of section 360. King Herod married Herodias, the ex-wife of his brother Philip.⁹⁶⁶ That was not incest in that kingdom and it would not be incest in this country. It may well be that the parties, by virtue of this close relationship of affinity, cannot get married. But consensual sexual intercourse between them is not an offence, at least not incest within the meaning of section 360. Sororate unions, levirate unions, brother-in-law and sister-in-law unions, and marriage by a man of two sisters at the same time or in succession are not unknown in this country.

Equally, sexual intercourse between adoptive parent and adopted child, between adopted child and the blood relation of his adoptive parent and between adopted child and the child of its adoptive parent are all beyond the reach of the law of incest under section 360. This is rather surprising because

⁹⁶⁴ Criminal Appeal No. BCA/41.c/82, unreported.

⁹⁶⁵ Gen 35: 22.

⁹⁶⁶ Mt 14: 3.

customary law adoption, unlike adoption in Western law, is generally between blood relations.

The entire focus of section 360 is on consanguinity or blood relationship. Consanguinity exists between all persons who have a common ancestor. And here, the law of incest draws no distinction between legitimate and illegitimate ascendant (ancestor) or descendant (offspring), or between relatives of the full blood and relatives of the half blood. Amram married Jochebed, his father's sister and had two sons, Aaron and Moses.⁹⁶⁷ The marriage was incestuous. Amnon committed incestuous rape when he forcibly had sexual intercourse with Tamar, his half sister.⁹⁶⁸ Absalom had sexual intercourse with the wives of his father, David.⁹⁶⁹ That would not be incest within the meaning of section 360. But incest was certainly committed when Lot's two daughters took turns in having sexual intercourse with him, and the fact that they first made him drunk before sleeping with him changes nothing.⁹⁷⁰

The prohibited degrees of consanguinity under the section are collaterals, and ascendants and descendants in direct line *ad infinitum* (for example, father and daughter, mother and son, grandfather and granddaughter, great grandfather and great granddaughter, great grandmother and great grandson). Collaterals are confined to brother and sister relationship. Uncle and niece, aunt and nephew relationships are by necessary implication excluded; and, *a fortiori*, cousins since these are not related to the common ancestor in the first degree.

A 'legitimate descendant' is any child born to parents who are lawfully married. The parents of such a child are his 'legitimate ascendants'. A 'natural descendant' is a child born to parents who are not lawfully married. The parents of such a child are his 'natural ascendants'. The word 'natural' here must be understood to mean 'illegitimate'. 'Natural' is not often used in this sense and in English is quite the reverse of how it is used here. The relevant relationship of the parties may be proved by oral evidence supplemented by certified copies of birth or marriage, or by extracts from the civil status registry.

Prosecution. No prosecution for the crime of incest may be commenced without the prior complaint of a relative by blood irrespective of degree. This requirement is dictated by a practical problem. First, there is the difficulty of detecting the crime by persons outside the family circle, especially as the crime is usually committed within the family and under cover of great secrecy. Secondly, there is need to have a witness willing and ready to come forward

⁹⁶⁷ Ex 6: 20.

⁹⁶⁸ 2 Sam 13: 1-16.

⁹⁶⁹ 2 Sam 16: 21-22.

⁹⁷⁰ Gen 19: 30-38.

and give evidence for the prosecution. A complainant would be willing to do so.

Cases of ‘notorious concubinage’ and of ‘incestuous rape’ may be prosecuted without the need of a prior complaint to trigger off the commencement of criminal proceedings against the accused. Here the need for a prior complaint as a condition precedent for prosecution is dispensed with because of the flagrant nature of the incestuous relationship and because in such cases evidence is much easy to come by. A neighbour or a domestic worker would have noticed that the parties are cohabitees or are seeing each other regularly. The parties themselves would have gone through a ceremony of marriage, which is a public act. There would probably have been a pregnancy or the birth of a child resulting from the incestuous marriage or concubinage.

The requirement of a prior complaint as a condition precedent to commencement of criminal proceedings in the ordinary run of incest cases has the effect of shielding most incest cases from prosecution. In the first place, since incest is in most cases consensual and in circumstances of strong affection between the parties, both have a vested interest in concealing the matter. Secondly, even in the case of incest procured through duress, the victim may be a young girl who may not have the strength to shake off the domination of the blood relation and report the matter to the police. Even when the incestuous relationship is found out by another family member, the fact that a report of say father-daughter incest may result in the imprisonment of the father with consequent economic hardship for the family, may dissuade the relative from reporting the matter to the police. Thirdly, the strength of the social taboo against incest is such that family members readily suffer the situation within the family circle rather than expose the whole family to shame and scandal.

Defence. Consent is no defence to a charge of incest. But it is a credible defence that the parties were not aware and had no reason to believe that they were related to each other within the prohibited degrees of consanguinity. Oedipus would have a good defence on a charge of incest with his mother Jocaste because he did not know and had no reason to suspect that she was his mother or even that the man he had killed in order to marry her was his own father.

According to the Biblical account of the incestuous incident involving Lot and his daughters,

“Lot left Zoar, fearful of the people there, and went to live in a cave in the mountains with his two daughters. One day the older girl said to her sister, ‘There isn’t a man anywhere in this entire area that our father would let us marry. And our father would soon be too old for having children. Come, let’s fill him with

wine and then we will sleep with him, so that our clan will not come to an end.' So they got him drunk that night, and the older girl went in and had sexual intercourse with her father; but he was unaware of her lying down or getting up again. The next morning she said to her younger sister, 'I slept with my father last night. Let's fill him with wine again tonight, and you go in and lie with him, so that our family line will continue.' So they got him drunk again that night, and the younger sister went in and lay with him, and, as before, he didn't know that anyone was there. And so it was that both girls became pregnant from their father."⁹⁷¹

The two girls may have acted out of realism. But incredible as the tale might be, Lot would have a good defence to an incest charge: he lacked the mental element for the commission of the offence and, in any event, was, on account of being made drunk, not aware that the girls took turns in having sexual intercourse with him.

An incest charge would be bad for duplicity if it simply alleges 'incest contrary to section 360'. In framing a charge alleging incest the prosecution must specify not only the subsection of section 360 that has been transgressed but must also indicate the specific relationship involved (for example, brother and sister, or ascendant and descendant such as father and daughter or mother and son).

Sub-section (2) of section 360 is merely procedural (having an evidentiary value only) and does not create an offence of 'notorious concubinage' or of 'incestuous marriage'.

Punishment. Incest *simpliciter* is punishable by imprisonment for from 1 to 3 years and a fine. The prescribed penalty for a person convicted of incestuous rape varies according to the age of the victim: life imprisonment where the victim is below 16 years of age (section 346(4) as read with s. 298 (a)); imprisonment for from 10 to 20 years where the victim is over 16 but below 21 years of age (section 347(1) as read with section 296) or above 21 years of age (section 298(a)).

2.6. Adultery

Adultery is committed when a spouse voluntarily has sexual intercourse with another person of the opposite sex who is not his/her spouse. The conduct has remained a common delinquency throughout ages. It was anciently punished in some lands as 'criminal conversation'. Nowadays, adultery is no longer a criminal offence in many jurisdictions. But in this country, where adultery was criminalized only in 1967, the conduct remains a criminal offence till this day.

⁹⁷¹ Genesis 19:30-36 (*The Small Group Study Bible*).

Section 361 of the Code punishes “any married woman having sexual intercourse with a man other than her husband”. It also punishes “any married man having sexual intercourse in the matrimonial home, or habitually having sexual intercourse elsewhere with a woman other than his wife or wives”. A spouse who has sexual connection with another person of the same sex (e.g. oral sex, buggery, sodomy) is not guilty of adultery, although the conduct could trigger a petition for divorce.

Rationale. Adultery is considered a grave breach of marital fidelity, which is a basic obligation of spouses. The primary justification for the crime of adultery is that it seeks to safeguard marital fidelity. A collateral justification is that the law of adultery seeks to protect the health of the family: protection of the family from the risk of adulteration through the possible introduction therein of a spurious child from ‘outside’; protection of the family from the risk of STDs, HIV and AIDS that may be contracted through indiscriminate sex. The basic interest, which this crime seeks to protect, is thus that of the family.

However, the effectiveness of the law of adultery may be seriously doubted. Spouses themselves habitually condone the extra-marital affairs of their spouses. Today’s society is very permissive. There is great tolerance in matters of sexual morality, one result of which is that there is no stigma to adultery. The criminalisation of adultery would therefore seem hypocritical, for it is in dissonance with and not sustained by contemporary morality. Decriminalisation of adultery would not mean the law’s encouragement of adultery. It would mean removing from the criminal statute book a law that is practically very difficult to enforce and thus ineffective. It would mean adultery would be left to the coercion of the spiritual authorities. It would mean adultery becomes a mere civil injury (‘seduction’ or ‘trespass’ or ‘marriage interference’) giving rise to private redress, as is the case under customary law.

Section 361 discriminatorily distinguishes between the adultery of a married woman and that of a married man, though the penalty (imprisonment for from 2 to 6 months and a fine) is the same in both cases.

Adultery by a married woman. By section 361 1), “any married woman having sexual intercourse with a man other than her husband” is guilty of adultery. Three ingredients constitute the *actus reus* of the offence, namely, ‘marriage’, ‘having’, and ‘sexual intercourse’. In *Alice Mbongeh & Sunday Daouda v. People* (1979)⁹⁷² the 1st appellant, a married woman, was charged with and convicted of adultery in that she had sexual intercourse with the 2nd appellant. The 2nd appellant was charged with and convicted of aiding and abetting the 1st defendant’s adultery. Since by s. 98 an accessory is punishable in like manner as the principal offender perhaps in the end charging one of the

⁹⁷² Criminal Appeal No. BCA/49.c/79, unreported.

miscreants as principal offender and the other as an abettor probably made no difference. But the charge was somewhat pedantic and, moreover, gave the impression that the woman was the active party and more deserving of blame than her paramour, an assumption that is questionable. The fact of the matter is that both committed adultery with each other and should simply have been charged as co-offenders.

A similar pedantic charge was drawn in the case of *Lyonga Emmanuel v. The People* (1972)⁹⁷³. The appellant was charged in the Magistrate's Court with being accessory to adultery contrary to section 97(1)(b) as read with section 361 (1) of the Penal Code. The co-accused, one Sophie, was charged with the adultery as principal offender, contrary to section 361(1). At the opening stages of the trial Sophie pleaded guilty to adultery and was taken as a prosecution witness against the appellant before she was convicted and sentenced. The appellant pleaded not guilty. At the close of the trial the accused persons were found guilty and sentenced accordingly. The appellant appealed to the Buea High Court, presided over by Endeley, CJ, where the appeal succeeded on grounds of a procedural irregularity at the trial in the court below.

The facts of the case were that Sophie's husband, Lucas, laid a complaint with the Police that his wife had committed adultery with the appellant. The complaint led to the arrest of the two accused persons. According to Lucas she returned home from work on the day of the alleged adultery and was embarrassed to note that his wife had abandoned their eleven-months-old baby alone in the house the whole day. When later he confronted her she at first told a lie that she had gone out to fetch food for the home, but later on confessed to having gone down to Tiko where she committed adultery with the appellant. At the end of the case for the appellant and the respondents the learned trial Judge made the following findings: that Lucas had condoned his wife's adultery and connived with her in setting in motion the criminal proceedings against the appellant; that the prosecution had led no evidence to negative connivance and condonation, and that there was a serious irregularity during the trial in the Magistrate's Court which occasioned a miscarriage of justice.

The learned Chief Justice then came to the follow conclusion: "In failing to call for the facts available to the prosecution on which the charge against Sophie Ndivé was founded, after she had entered her plea of 'Guilty', and in failing to rule on the said plea before proceeding to conviction and sentence, the learned trial Magistrate committed a procedural error which affected the regularity of the whole trial. There was a serious trial irregularity when after Sophie Ndivé had been accepted as a witness for the prosecution and given evidence as such, she was again called upon to cross-examine the appellant when he was testifying on oath in his own defence. Judging this appeal

⁹⁷³ (1971-73) UYLR 50.

therefore from the standpoint of either the operative law or the facts in evidence, it is destined to succeed. Because of the procedural irregularities, which appeared at the trial, the success of this appeal must operate also in favour of the convict, Sophie Ndivé. In the result, the appeal is allowed, an order of acquittal is entered in favour of the appellant, Lyonga Emmanuel, and an order of discharge entered in favour of Sophie Ndivé.”

Marriage. The prosecution must prove that the defendant is a married woman. This is relatively easy since this country has a system of registration of marriages (as well as of births and deaths), though of course there are many instances of customary marriages in the rural areas that are not registered. Production of a marriage certificate, or in default, some other relevant and admissible document, or *viva voce* evidence (oral evidence given from the witness box) elicited through credible witnesses, attesting to the fact that the defendant is lawfully married will be conclusive on the issue. So long as the woman can be shown to be lawfully married at the time of the alleged adultery, the type of marriage she may have contracted (monogamous or polygamous) and the system of law under which she contracted that marriage (under statute or under custom) are irrelevant.

But there must be a valid subsisting marriage, at least at the time of the alleged adultery. The woman is not guilty if the marriage is void (as opposed to a voidable marriage, which is valid until nullified by a court of competent jurisdiction at the behest of one of the spouses or of both of them) or if at the time of the alleged adultery her marriage had been legally terminated⁹⁷⁴. A widow, a divorcee, a mere fiancée or cohabitee cannot be guilty of adultery as principal offender.

Sexual intercourse. Sexual intercourse between the married woman and a man other than her husband is what constitutes the offence. Sexual intercourse means penile-vaginal penetration, that is, intercourse *per vaginam*. The slightest degree of penetration suffices. But the offence is not consummated if all that the woman did was that she engaged in other acts of sexual gratification with a man or with another woman. Thus a married woman does not commit adultery if she allows artificial insemination or if she engages in masturbatory acts or in fellatio or in kissing and fondling or in anal intercourse (buggery) with a man. Nor does she commit adultery if she engages in acts of lesbianism with another woman. The mere fact that a married woman spent a night or a weekend with a man, or that she wrote love letters to a man, or that she sent

⁹⁷⁴ That is, by divorce; or by nullification by a competent court; or by death, including the case of presumed death where a person has disappeared and has not been heard of for at least seven years, a situation that raises an rebuttable presumption of law under section 143(1) of the Evidence Ordinance, Cap 62, that a person absent for that long is dead.

love messages on the cell phone or the Internet to a man, or that she sent to a man her photograph or a gift is not proof of sexual intercourse between them.

Any such conduct by a married woman may probably ground a petition for divorce on the basis that she has behaved in such a way that the husband cannot reasonably be expected to live with her. But it would not be enough to sustain a charge of adultery under section 361. The law does not act on the slanderer's proverb that 'there is no smoke without fire'. The requisite standard of proof in criminal cases is proof beyond reasonable doubts, and not proof on a balance of probabilities as in civil cases.

The sexual intercourse between the married woman and the man must be consensual. The section does not expressly say so, but certainly means that the intercourse must be consensual. This follows from section 74 of the Code, which sets out the mental element required for an offence. Of course, when a married woman is raped adultery in fact is thereby committed. But in law the woman has committed no adultery. The adulterer is the rapist.

The Code makes no provision for 'adulterous rape'. So in the case of the adulterer rapist the adultery offence merges with that of rape and the prosecution must make an election as to which of the two crimes to prosecute. He cannot charge both as the charge would be bad for duplicity, but he may charge both in the alternative.

In practice, in a situation of merger of offences such as this one, the prosecution tends to charge the more severely punished of the two offences on the theory of 'lesser included offence'. One reason for this prosecutorial practice is the need to avoid an oppressive prosecution. But the practice has one important advantage. The court is entitled to convict if the evidence discloses the commission of the lesser offence rather than of the more severely punishable offence.

The place where the adultery by the married woman is committed is immaterial. It may be in or out of the matrimonial home. It may be within the country or abroad.

'Having'. Would a single act of adultery by the married woman suffice to attract visitation by the criminal law? This may be doubted. The draftsman does not use the word 'has', which he could have, had he been so minded to do⁹⁷⁵. He uses the word 'having'. The verb 'to have', used in the present participle connotes continuity or repetition. The effect of the use of that word is that adultery under section 361(1) is only committed either when the married woman is caught *en flagrant délit d'adultère* (i.e. caught red-handed committing adultery; which is very rare) or when the married woman is still 'seeing' her paramour(s). This eliminates the 'once only' isolated 'fling', and also the single act of adultery committed in the distant past and which may have been

⁹⁷⁵ He could have said: 'any married woman who *has* sexual intercourse...'

condoned by the other spouse or the prosecution of which may perhaps be statute barred. This interpretation is consistent with sub-sections (3) and (4) of s. 361 and the general benignity of society towards adultery. The criminal law is generally supposed to reflect society's moral considerations. It cannot be more royal than royalty by seeking to punish conduct in circumstances regarded by the community as tolerable. In practice therefore, a single act of adultery is rarely prosecuted, assuming even that it is known.

Adultery by a married man. This is made an offence under section 361(2). The discussion on the subject of adultery by a married woman also applies *mutatis mutandis* (making the necessary alterations) on the subject of adultery by a married man. It remains only to consider the import of certain terms introduced in the definition of the adultery by a married man, namely, 'matrimonial home', 'habitually', and 'wife or wives'.

'Wife or wives'. This term serves only as a reminder that polygamy is in this society a legally valid institution on a footing of complete legal equality with monogamy. A polygamous husband who has sexual intercourse with his many wives does not thereby commit adultery. But he is guilty of adultery if the woman he is alleged to have had sexual intercourse with is not one of his wives but some other woman. It is no answer to the charge for the man to show that the woman in question is a girlfriend he hopes to marry or is a lady to whom he is engaged or that she is his ex-wife.

Matrimonial home. The adultery of a married man is punishable only if it took place 'in the matrimonial home' or if it habitually took place somewhere else. The matrimonial home is the dwelling house(s) where the husband and wife (wives) and their children, if any, live. In the ordinary run of case there would be only one matrimonial home. But in some cases there may be more than one, as where husband and wife are living in different places for professional reasons or where the family has another home (e.g. a country house or a flat abroad) where they spend their holiday or where each of the wives of a polygamist has a separate house or flat in which she lives. The matrimonial home need not be property owned by the spouses. It need not be a permanent accommodation. The fact that the spouses are only tenants and the fact that the dwelling place is a flat changes nothing. But a hotel room or a hostel room or a guest house temporarily occupied by the husband while on holiday or on business or while pursuing studies is not the matrimonial home even if he may be visited there by his spouse(s).

'Habitually'. The word 'habitually' means 'frequently'. On the face of it section 361(2) appears to be saying that a married man is guilty of adultery if

he commits a single act of sexual intercourse with a woman who is not his wife or is not one of his wives but that he is not caught by the law of adultery if the impugned sexual act took place 'elsewhere' and that this adultery 'elsewhere' will amount to an offence only when it is 'habitual'. Such a construction of the provision will result in absurdity.

There is no compelling reason for the distinction introduced by the provision between a married man's adultery 'in the matrimonial home' and his adultery 'elsewhere'. Why should a married man's adultery 'elsewhere' be an offence only when it is 'habitual'? And why should the same yardstick not apply in the case of a married woman's adultery?

The fact of the matter is that the distinction is absurd and discriminatory. Take for example the case of double adultery (sexual intercourse between a married man and a married woman, each being married to someone else) on a single occasion and outside the matrimonial home. It is illogical in such a case to hold the woman guilty as principal offender and the man guilty merely as an accessory on the dubious reasoning that his adultery was only once and outside the matrimonial home.

A purposeful and egalitarian interpretation of section 361 would be to hold that 'having' connotes 'habitual'. Consequently, the crime of adultery whether committed in or out of the matrimonial home is consummated only when the adultery is habitual (possibly more than once). On this interpretation the word 'habitual' in section 361(2) would be taken as either otiose or that it was added for mere emphasis only. This interpretation brings sub-section (2) in line with sub-section (1), thus having the effect of nullifying the questionable distinction between adultery by a married woman and adultery by a married man.

Bars to prosecution. A let-out for many adulterous spouses is the provision that no prosecution may be commenced without the complaint of the wronged spouse (section 361(3)). Furthermore, the connivance or condonation⁹⁷⁶ of the wronged spouse is a bar to the commencement or continuation of any prosecution (section 361(4)). Consent by the wronged spouse *to resume cohabitation* puts an end to the effects of conviction (section 361(4)); that is, the convicted adulterer or adulteress is saved from serving his or her sentence. The conviction however is not expunged. The law, be it noted, requires only that there be 'consent to resume cohabitation' and not that cohabitation should actually have resumed.

Section 361(4) is a let-out for many spouses liable to be prosecuted for adultery because wronged spouses seldom complain, in many cases probably because their own hands are dirty. If their hands are dirty they cannot seek

⁹⁷⁶ *Lyonga Emmanuel v. The People* (1971-1973) UYLR 50.

equity because he who comes to equity must come with clean hands. Where a complaint is made at all one can be sure that it is a strong indicator that the marriage has broken down irretrievably.

Where a marriage is salvageable a complaint by the aggrieved spouse is most unlikely to be forthcoming. Societal attitude appears to be that it is silly to lose one's marriage because of an occasional marital infidelity if the marriage is otherwise a 'going concern'. Finally, condonation and consent are treated as acts of reconciliation.

Simple Offences and Principles of Criminal Law

§1. Regulatory offences and strict liability

‘Simple offences’ are petty violations and a person who commits any such offence may be arrested without a warrant. They are triable summarily in a magistrate’s court. Perhaps for this reason it is often said that a person is guilty of a simple offence upon proof only that he committed the physical ingredient of the offence, proof of mental element being irrelevant, so it seems, because not required by the law. The claim in effect is that ‘simple offences’ are crimes of strict liability. This claim may be examined a little closer.

Historically, the concept of strict liability in the common law system was extended from tort law to penal legislation especially to crimes of minor character when *raison d’Etat* took precedence over notions of justice. Today, strict liability results from the will of the lawmaker when he creates minor offences of a regulatory character *without taking the precaution of making express reference to a mental element*. In crimes of strict liability therefore, liability attaches without any requirement of fault or other mental state on the part of the offender. Where, in regulatory offences, the mental element has been dispensed with liability is strict and this means the prosecution is exempt from having to prove fault or any other mental state on the part of the defendant.⁹⁷⁷

Two points are worthy of emphasis. The first point is this. Where, in creating an offence characterized as a ‘simple offence’ (regulatory offence), the lawmaker makes no express reference to a mental element, it seems legitimate to consider such an offence as one of strict liability first, on the reasoning that mental element has by necessary implication been excluded, and secondly, on the reasoning that in any event the punishment for such an offence is always a token penalty. But where, in creating an offence characterized as a felony or a misdemeanour the lawmaker is silent on the issue of mental element (i.e. does not expressly exclude it), it is always the case, and s. 74 says so, that a mental element is a constituent element of such an offence. By section 74(4), “Except as otherwise provided by law, there shall be no criminal responsibility unless subsection 2 of this section [i.e. the requirement of intention] has been satisfied: Provided that responsibility for a simple offence shall not require any intention to act or to omit or to cause the result.”

The second point worthy of emphasis is this. There is no necessary

⁹⁷⁷ Strict liability also prevents accused persons getting away with dishonest defences, though this is an issue that can be resolved by putting an evidential burden on the defendant. If an evidential burden were put on the defendant accused of committing a regulatory offence the legal burden of proof will not thereby be affected, for it remains throughout on the prosecution to prove the act alleged against the defendant.

correlation between severity of penalty and the necessity for mental element. In other words, it is not the case that the requirement of mental element must be read into any offence carrying a severe penalty and in respect of which the law is silent on the question of mental element. In *Gammon v. Attorney General for Hong Kong*⁹⁷⁸, the Privy Council pointed out that there is nothing inconsistent with a law imposing severe penalties for offences of strict liability. Severity of penalty does not rule out the possibility of an offence being construed as one of strict liability.

It is trite that the object of the criminal law is to secure compliance with rules of behaviour, primarily through the threat of punishment if they are broken. It is also trite that mental element is the foundation of criminal justice. Arguably then punishment ought not to be imposed upon a person who has no criminal mind, at any rate if he is not even negligent. But that is precisely what the lawmaker does when he creates crimes of strict liability.

“It is sometimes said that strict liability is imposed where the offence is the result of modern legislative policy and not of traditional morality, or in other words where it is a matter of *malum prohibitum* rather than *malum in se*. ... *Mala prohibita* are sometimes called ‘quasi-criminal offences’ – offences that are regarded as not criminal in any real sense, but acts, which in the public interest are prohibited under penalty. They are also called ‘public welfare offences’ or ‘regulatory offences’. To use these expressions is easier than to say exactly what they mean. The so-called quasi-criminal offences are followed by the same procedure for prosecution and kinds of punishment as other offences. All offences are, in a sense, public welfare offences, and all result from legal regulation. Perhaps the argument is that a person’s reputation is not lowered because he is found guilty of a technical offence, and in such a case people are not interested to know whether he committed the offence knowingly or not. One can indeed make a broad distinction between technical offences and particularly disgraceful acts, but it is a matter of degree. If the principle is that strict liability applies only to technical offences, the courts have an idiosyncratic idea of what constitute such an offence.”⁹⁷⁹

It is an overstatement to say that simple offences in the Penal Code are all offences of strict liability. In some simple offences there is no express requirement of a mental element. There, it can be assumed that the lawmaker intended to create strict liability. But there are a good number of other simple offences in respect of which the lawmaker has inserted an express requirement of mental element, not being the requirement of intention. For, the specific mental element that is excluded by the proviso to section 74 4) is intention and not other mental states.

⁹⁷⁸ (1925) AC 1.

⁹⁷⁹ G Williams, *Textbook of Criminal Law*, Stevens & Sons, London, 1978, p. 912.

In two instances under section R. 370 criminal liability would attach only where the ‘simple offence’ was committed intentionally, that mental requirement being conveyed by the words ‘wilfully’ (section R. 370 (1)) and ‘knowingly’ (section R. 370 (9)) even though section 74(4) says responsibility for a simple offence shall not require any intention. There are other cases in which some other mental element is expressly required. In those cases the mental state that must be proved in order for liability to attach is the element of fault on the part of the defendant. A variety of terms are used to denote this fault element: ‘fail’ (section R. 367(1)(3)(4)), ‘neglect’ (section R. 367(5)), ‘carelessly’ (section R. 367(10)), ‘negligence or carelessness’ (section R. 368(8)), ‘careless or clumsy’ (section R. 369(2)), ‘clumsiness, negligence, carelessness or failure’ (section R. 370(2)), and ‘carelessness, inattention, negligence or failure’ (section R. 370(4)).

§2. Regulatory offences and vicarious liability

Vicarious criminal liability is rare in criminal law. The general principle is that a criminal act is primarily the responsibility of the actor; other persons are generally liable for it only when they possess a mental element. As an elementary principle both of justice and of utility a person should not be held accountable for the wrong of another. But there are exceptions. One exception is that a company is vicariously liable for the misdeeds of its employees to the same extent as a human employer would be liable. The other exception is that the lawmaker sometimes creates vicarious liability.

In the category of offences under consideration there are a few offences that are capable of being construed as importing vicarious liability. Some statutory verbs such as ‘driving’ and ‘demanding’ are ‘personal’ entailing criminal liability only where the defendant himself did the actual driving or demanding, as the case may be.

There are, however, a number of statutory verbs used in creating some simple offences and that are capable of being construed vicariously. Some of these verbs are: ‘allow’, ‘cause or allow’, ‘cause’, ‘use’, ‘assume possession’ and ‘keep’. Even though each of these verbs may be read as a mental element word (i.e. as presupposing the defendant’s knowledge of what is happening) they are capable of being construed vicariously.

Section R. 368(2) penalises “innkeepers and lodging-house keepers who *keep* their arrival and departure register in an incomplete manner or who do not present it at the times prescribed by the regulations or when they are required so to do by the competent authorities.” Suppose that the keeper of such a place has installed a manager who deliberately keeps the register in an incomplete manner or does not present the register as when required. The manager is the real offender. But, paradoxically, it is impossible to convict him because the provision strikes only at the keeper (of an inn or a lodging-house).

The general tendency, in public welfare offences, is to interpret a statutory verb in such an extensive sense as to embrace say employers, owners, masters, and other persons responsible by law. Thus a person may be held to ‘cause’ a result by employing or delegating or entrusting someone who causes it. Supposing that **D** asks **F** to exercise his German shepherd in his yard and in the course of doing so the dog breaks loose from the leash and eats up **E**’s goat tethered and grazing nearby. **D**, and not **F**, would be liable under section R. 369 (1) for causing the death of **E**’s animal. If **P**’s housekeeper lets **P**’s cat out of the house and it goes over the wall fence and eats up a rabbit belonging to **P**’s neighbour **P** can properly be convicted of causing the death of the rabbit.

The words ‘use’, ‘allow’ and ‘possess’ have a similar effect. Thus, it is commonly said that a man uses his vehicle if his servant uses it on his business. Suppose that **A** goes into a butchery to buy meat, which is weighed using weights in the shop that are different from the prescribed ones. The owner of the butchery, and not the attendant, can be convicted under section R. 369(4) for ‘using’ those weights.

Suppose again that an owner of cattle allows or instructs his servant to take them out to the fields to graze and the cattle damage farm crops on another’s land. Surely, the cattle owner would be liable as the offender. And yet in *Umarou Chayo v The People* (1979) where the facts were similar to the hypothetical given, the Bamenda Court of Appeal (Ekor”Tarh, Nganje and Anyangwe, JJ) held otherwise. In delivering the unanimous judgment of the Court, Nganje, J said that the charge against the appellant “as a principal offender was misconceived” and that he “ought to have been charged as an accessory to the crime.” One may ask: accessory to the crime committed by whom, the cattle? It is submitted that the decision of the Court was wrong.

§3. Regulatory offences and accessoryship

There can be no attempt at an unintentional offence (section 94) and there can be no conspiracy to commit an unintentional offence (section 95). Similarly, abetment cannot exist in respect of simple offences; there can be no unintentional accessory (section 97(1)). It follows from this general statement of the law that strict liability does not apply to inchoate offences or accessoryship. To be guilty as attempter, or conspirator, or accessory, the defendant must have acted intentionally (i.e. known the relevant facts).

However, there are two ‘simple offences’ in respect of which a person can be convicted as accessory. Section R. 369(5) punishes the perpetrators of and the *accessories* to any disorder, disturbances or unlawful assembly of an abusive nature or at night which disturbs the peace of local residents. Section R. 370(1) penalizes the perpetrators of and the *accessories* to any brawl or act of violence of a minor nature not resulting in an illness or an incapacity for work lasting

more than eight days.

§4. Regulatory offences and sentencing

Sections R. 364, 365 and 366 set out sentencing directives or principles governing 'simple offences'. First, where the fine imposed on a person convicted of a simple offence is not paid the court is required to transmute the fine to a term of imprisonment. Second, if the assets of a person convicted of a simple offence are insufficient to meet the fine imposed on him the court is required to sublimate the interest of society into that of the victim of the offence by ordering restitution and compensation in lieu of the fine. Third, if the restitution is not made or the compensation/fine is not paid, as ordered by the court, the convicted person is required to be committed to prison and there to remain until the restitution or compensation is fully made.

Imprisonment in default of payment of fine. Provision is made for imprisonment in default. Where a person is convicted and sentenced to a fine which is not paid the court is empowered to order the convicted person to be imprisoned, in default of payment of the fine, for a period of 5 days, if the sentence to the fine was in respect of a simple offence of the first class, 10 days in respect of that of the second class, and 1 month in respect of that of the third or fourth class. However, the court has no power to order the imprisonment of a convicted person for more than 15 days if he proves that he is insolvent.⁹⁸⁰

Restitution and compensation. Where a convicted person is sentenced to a fine and his assets are insufficient to meet the fine imposed on him the court is required, in lieu of the fine, to order restitution to and compensation for the victim of the offence. There is an implied order of priority here. The convicted person must look for money to pay the fine. If the money cannot be raised his assets are liable to be seized and sold to pay the fine. But if his assets are insufficient to meet the fine then the convicted person will be relieved, so it seems, of the obligation to pay the fine. The court will instead order him to make restitution and pay compensation to the victim.

The issue of restitution and compensation for the victim comes into play only when the assets of the convicted person are insufficient to meet the fine imposed on him. In such a circumstance the state is then prepared to forego the fine in favour of the insufficient assets being sold to compensate the victim

⁹⁸⁰ What the provision on imprisonment in default suggests is that a person convicted of a simple offence and sentenced to pay a fine must do so on the spot. Further, a fine of from 200 to 1200 francs is considered as roughly equivalent to 5 days imprisonment, that of from 400 to 2 400 francs roughly equivalent to 10 days imprisonment, and that of between 2 600 to 25 00 francs roughly 1 month imprisonment.

of the offence.

Further, since restitution and compensation for the victim of the offence are ordered only after it becomes clear that the convicted person cannot pay the fine imposed on him, one wonders where it is expected that he will raise the money to pay as compensation to the victim, except if the assumption is that the compensation would always be less than the fine. One can imagine how matters will proceed. The impecunious convicted person will be unable to pay the compensation. The court will then invoke section R. 366 and send him to jail and there to remain until full payment has been made.

This whole issue of inability to pay a fine is practically a moot one. The fines for the transgression of regulatory offences are so small that they are within the ability of even the poor offender to pay.

Imprisonment in default of payment of compensation. If the compensation or restitution or costs ordered by the court is not paid the court is required to make a further order that the convicted person be imprisoned and there to remain until full payment has been made. However, where such an award is in favour of the State and the convicted person is insolvent, the court may not order his detention for more than 15 days.

Classes of simple offences

§ 1. Simple Offences of the First and Second Class

‘Simple offences of the first class’ constitute the class of least serious regulatory offences because the prescribed penalty for any offence falling within that class is a mere token or nominal fine (of from 200 to 1 200 francs). On the other hand, ‘simple offences of the second class’ are slightly more serious and are punishable by a petty fine (of from 1 400 to 2 400 francs).

1.1. Simple offences of the ‘first class’

By section R. 367 the following persons are guilty of a simple offence of the first class:

- Those who fail to maintain ovens, chimneys or factories in which fire is used.
- Those who fail to repair ovens, chimneys or factories in which fire is used.
- Those who fail to clean ovens, chimneys or factories in which fire is used.
- Those who violate the prohibition to let off, in certain places, fireworks.
- Innkeepers and others, who, being required to provide lighting, fail to do so.
- Those who cut off lighting, which has been provided in the public interest.
- Those who fail to clean the streets and passageways in localities where the local residents are responsible for such cleaning.
- Those who encumber a highway by depositing or leaving unnecessarily thereon any material or object which obstructs or impairs the right of way or safety of traffic.
- Those who, in violation of the laws and regulations, neglect to illuminate a material stored by them or excavation work done by them in a public place or on a highway.
- Those who throw or expose in front of their houses any object capable of causing harm either by its fall or by noxious fumes.
- Those who do not comply with the laws and regulations concerning the campaign against parasites of every kind in the countryside and in cultivated areas and gardens.
- Those who, without infringing any other provisions of the law, pick fruit belonging to another person in order to consume it on the spot.
- Those who, without having been provoked, use, not in public, against another person any kind of abuse referred to in section 307 (1) of the Penal Code.

- Those who carelessly throw rubbish on to another person.
- Those who, not being the owners, life tenants, lessees or tenant farmers of a particular piece of land, not having a right to use or a right of way over the said piece of land and not being the employees or agents of any such persons, pass over the said piece of land or part thereof if it has been worked or sown.
- Those who are found drunk and disorderly in a public place.
- A registrar who infringes the provisions of Article 23 of the decree of 24th May 1966 relating to the record of capital executions.

1.2. Simple offences of the ‘second class’

By section R. 368 the following persons are guilty of a simple offence of the second class:

- Those who infringe any of the provisions concerning the opening of agricultural seasons.
- Innkeepers and lodging-house keepers who keep their arrivals and departures register in an incomplete manner.
- Innkeepers and lodging-house keepers who do not present their arrivals and departures register at the time prescribed by the regulations or when they are required so to do by the competent authorities.
- Those who allow (a) any dangerous person of unsound mind who is in their charge; or (b) any dangerous or savage animal, to roam freely.
- Those who do not retain their animals when the latter attack or chase after passerby even if no damage is done.
- Those who through any hard object or rubbish against any building, house or fence of another person or into any garden or enclosed area of another person.
- Those who, not being the owners or life tenants of a particular piece of land and not having a right to use or a right of way over the said piece of land, enter upon the said piece of land before harvesting has been carried out.
- Those who cause or allow any vehicle or any animal in their charge to pass either over the land of another person when that land has been worked or sown or is ready for harvesting, whatever the season, or in a coppice of another person.
- Those who employ in premises licensed for the consumption of alcoholic beverages any woman of less than eighteen years of age with the exception of members of the family of the licensee.
- Those who by negligence or carelessness damage in any way any

telephonic or telegraphic installation or apparatus thereof.

§ 2. Simple Offences of the Third and fourth Class

2.1 Simple offences of the third class

Simple offences of the third class are petty offences punishable by a small fine of from 2 600 to 3 600 francs. Section R. 369 penalizes as guilty of a simple offence of the 'third class' the following persons:

- Those who cause the death or injury of any animal or beast belonging to another person, as a result of the straying of a dangerous person of unsound mind or a dangerous animal or as a result of the excessive speed, bad driving or overloading of any vehicle, horse, draught-animal, beast of burden or mount.
- Those who cause the death or injury of any animal or beast belonging to another person either by the careless or clumsy use of a weapon or by the throwing of a hard object.
- Those who cause the death or injury of any animal or beast belonging to another person by the decrepitude, dilapidation or lack of repair or maintenance of any house or other building or by an encumbrance or excavation or the like on or near a highway without the prescribed or usual precautions being taken or the prescribed or usual signals being given.
- Those who use weights or measures differing from those prescribed by the texts in force.
- The perpetrators of and accessories to any disorder, disturbance or unlawful assembly of an abusive nature or at night, which disturbs the peace of local residents.
- Those who allow any livestock in their charge to feed on the land, whatever the nature of the latter, of another person.⁹⁸¹
- Those who, outside the cases provided in section 230(1) of the Penal Code, damage in any way any highway.
- Those who outside the cases provided in section 230(1) of the Penal Code dilapidate in any way any highway.
- Those who, outside the cases provided in section 230(1) of the penal Code encroach upon the borders of any highway.
- Those who, without being duly authorized so to do, take from public property other than public thoroughfares any earth, sand, stones or gravel, unless general usage so permits.
- Those who, after assuming possession of any stray or abandoned livestock, fail to make to the Mayor's office or the Village Chief within

⁹⁸¹ *Umarou Chayo v The People* (1979), Criminal Appeal No. BCA/3.C/ 79, unreported.

three days a declaration of having done so.

- Those who infringe or do not conform to any legally made and correctly published regulation or order of the municipal authority.

In terms of section 369(10) when a ‘municipal authority’ makes a regulation or an order creating a simple offence, it may classify the offence so created into the first or second class. Further, the municipal authority may get the line Ministry over municipal councils to make a decision classifying into a simple offence of the fourth class a simple offence created by the municipal authority.

2.2 Simple offences of the fourth class

This is the most severely punished class of simple offences. Each of the offences under this class is punishable by a fine of from 4 000 to 25 000 francs and/or imprisonment for from 5 to 10 days.

In *Isaac Chia v The People* (1979)⁹⁸² the appellant was convicted of an offence under section R. 370(1) and sentenced to ‘10 000 francs or imprisonment of 2 months in default of payment of the fine’. On appeal it was held that the sentence pronounced by the trial Magistrate was illegal. The conviction was upheld and the sentence varied to read ‘10 000 francs or 10 days imprisonment’.

The following persons are, in terms of Section R. 370, guilty of a simple offence of the ‘fourth class’:

- The perpetrators of and the accessories to any brawl or act of violence of a minor nature not resulting in an illness or an incapacity for work lasting more than eight days.⁹⁸³
- Those who willfully throw any hard object or rubbish on another person.
- Those who, outside the cases provided in section 290(1) and (2) of the Penal Code, cause by clumsiness, negligence, carelessness or failure to observe the regulations an illness or incapacity for work lasting thirty days or less.
- Those who, when they are not hunting, allow any dog in their possession to stray in search of game.
- Those who, outside the cases provided for by section 288 of the Penal

⁹⁸² Criminal Appeal No. BCA/21.C/79, unreported.

⁹⁸³ *The People v. Sunday Ibe & Effiong Udoh Ake* (1975), TM/293c/75, unreported, (two taxi drivers fighting over a passenger); *The People v. Ambe Fosama* (1983), Criminal Appeal No. BCA/22, unreported, (respondent held not guilty of assault occasioning death under section 27(1), but guilty of simple assault under section R. 370(1)).

Code, cause by carelessness, inattention, negligence or failure to observe the regulations any movable or immovable property of another person to catch fire.

- Those who damage any ditch, fence or quickset hedge and those who remove dry wood from any hedge.
- Those who, by any means other than those provided for in section 157 and 158 of the Penal Code, obstruct the performance of his lawful duty by any person engaged in the execution of any law, regulation, or decision in the administration of justice or other lawful order.
- Those who, without lawful excuse, refuse or neglect to carry out a service as required by a court judgment or in the circumstances of any accident, tumult, shipwreck, flood, fire or any other disaster.
- Those who, without lawful excuse, refuse or neglect to furnish assistance as required by a competent authority either in cases of committal of a felony or misdemeanour or in order to ensure the execution of a court judgment or in the circumstance of any accident, tumult, shipwreck, flood, fire or any other disaster.
- Those who send by the post any document or other article not authorized by the texts in force or provide a false declaration of the contents.
- Those who infringe the Posts and Telecommunications monopoly.
- Those who knowingly use an irregular installation for the transmission or reception of any message.
- Those who use in a manufacturing process any product that is prohibited by the texts in force.
- Those who, having been present at a delivery, do not make within the period of time prescribed by the law, any declaration of birth, which the law may require.

Those who, having found a new-born baby, do not turn the baby over to the Civil Status Registrar or, if they wish to take charge of the said child, do not make a declaration to that effect to the Civil Status Registrar of their local council.

- Those who infringe any legally made and regularly published regulation or order issued by an authority other than those referred to in section R. 369(10). In *Benedict Nso v. The People* (1982)⁹⁸⁴ the appellant was convicted for violating a verbal declaration made at a gathering by the senior district officer ordering anyone still farming on grazing land to stop doing so with immediate effect. On appeal to the Bamenda Court

⁹⁸⁴ Criminal Appeal No. BCA/27.C/82, unreported.

of Appeal (Njamnsi, Asu and Arrey, JJA) it was held, allowing the appeal (Asu, J. delivering the unanimous decision of the Court) that the conviction of the appellant for violating a nonexistent prefectorial order was wrong in law as the purported order was a mere oral declaration and thus not legally made and regularly published in accordance with section R. 370(12). The learned Judge stated that, “A mere statement from an administrator to a person or persons not to do a thing has no force of law.” In *Nkemchop Azuh Mathias v. The People & 3 Ors* (2008), Appeal No BCA/MS/15c/2006, unreported, the appellant was convicted and sentenced by the Bamenda Court of First Instance for failing to respect the terms of an order by a sub-prefect, and thereby committing an offence under section R. 370(12) of the Penal Code. He appealed on the ground that the trial court found him guilty as charged when there was no evidence that the order in question was ever served on him or ever regularly published. Held, Nnoko J delivering the judgment of the Court allowing the appeal, that “regular publication is an ingredient of the offence which would have been achieved either by publication in the normal manner or by direct service. In [the instant] case direct service would have been appropriate given that the order was directed particularly to the appellant. It was an order in personam.” The prosecution however succeeded in *Ngong Margeret & 18 Ors v The People* (2003), Appeal No. BCA/MS/25c/2002, unreported. There, one of the charges accused the defendants/appellants of infringing the order of the local divisional officer re-sealing a church. In that case, Appellants, all women, were charged with having broken the seal lawfully affixed on the Baptist Church Baingo, Belo, contrary to section 191, infringing an order re-sealing the said Baptist church, contrary to section R. 370 (12), and contempt of the Divisional Officer for Belo by breaking his seal lawfully affixed on the said Baptist Church, contrary to section 154(new). The accused had been intercepted and arrested when they were marching to Belo carrying the wrenched doors and the plants used to seal the doors. They admitted removing the doors from their hinges and were marching to Belo carrying them. They were convicted on all counts. Conviction was confirmed on appeal but the sentences passed ordered to run concurrently and not consecutively as the trial court had ordered.

- Those who do not conform to any legally made and regularly published regulation or order issued by an authority other than those referred to in section R. 369(10).

Sub-sections (7) to (10) of section R. 370 provide for the possibility of

liability for more severe penalties, i.e. for penalties higher than 10 days' imprisonment and a fine. Sub-section (12) of the same section creates the offences of not conforming to or of infringing a legally made and duly published regulation/order of an authority other than the municipal authority. The authority making the regulation/order has a discretionary power under the sub-section to classify, by express provision in the regulation/ order, the simple offences it creates either under the first, second, or third class.

“This book is an outstanding piece of scholarship. It is well researched and well written with the arguments carefully and convincingly presented in a simple, clear, well organized and accessible manner by a person who is certainly on top of the subject... this is the first and only book on the subject and deals with a topic which is complicated by the fact that the Penal Code combines, sometimes in a complex and confusing manner, aspects of both the English common law and the French civil law. The author shows a profound understanding of the complexities of the subject and the outcome is a book which will be of great interest not only to the Cameroon’s scholars but also to comparative lawyers anxious to see how elements of English and French criminal law can be blended in a coherent manner.”

**PROFESSOR NELSON ENONCHONG,
FACULTY OF LAW, UNIVERSITY OF NOTTINGHAM, ENGLAND**

This is a pioneer, long overdue and truly original book that offers a unique, comprehensive and thorough exposition of the criminal law of Cameroon by a leading scholar. This latest book by Professor Carlson Anyangwe adopts a thematic approach, each chapter covering a specific aspect of the criminal law. The text is a clear, simple and comprehensive exposition of all the offences codified in the Penal Code. It offers a rich, clear, learned and discerning analysis to understanding of the criminal law. The book is designed to instruct and to contribute to a deeper understanding of the subject, the treatment of which is unique, informative and makes for compelling reading. This is the first textbook ever on the subject in Cameroon and it is undoubtedly an indispensable tool of trade for judges, prosecutors, lawyers in private practice, academic lawyers, law students and law enforcement officers.

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